In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1040

THOMAS SANABRIA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Thomas Sanabria petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on December 29, 1976.

Opinion Below.

The opinion of the court of appeals, not yet reported, is reproduced as Appendix A. No opinion was rendered by the district court.

Jurisdiction.

The judgment of the court of appeals was entered on December 29, 1976, and this petition is being filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Do 18 U.S.C. § 3731 and the double jeopardy clause permit the Government to appeal from an evidentiary ruling made after jeopardy has attached, when the defendant is ultimately acquitted, and a new trial would be necessary in the event the Government's appeal were successful?

2. Do 18 U.S.C. § 3731 and the double jeopardy clause permit the Government to appeal from a decision, made after jeopardy has attached, dismissing a "discrete basis of criminal liability" which constitutes less than an entire count of an indictment, considering that the effect of a rule permitting such an appeal would be to expand greatly the number of legal rulings appealable by the Government and to undermine substantially the finality of judgments of acquittal?

3. The petitioner was charged in a single count indictment with violating 18 U.S.C. § 1955, which makes it a federal crime to engage in "an illegal gambling business." The federal statute defines such a business as one which, among other

things, involves five or more persons and is in violation of state law. At petitioner's trial, the Government introduced evidence that the single gambling business charged in the indictment involved illegal state betting on (a) horse races, and (b) numbers. The court excluded evidence of the numbers activity on the ground that this theory of criminal liability was not encompassed by the indictment. The court then found that the evidence of horse betting was insufficient to support a conviction, and entered a judgment acquitting the petitioner.

Do 18 U.S.C. § 3731 and the double jeopardy clause permit the Government to appeal from the trial court's ruling on the evidence of numbers activity, when the single count indictment charged only one crime and the Government concedes it is barred from appealing the acquittal as to the ruling on the horse betting?

4. The indictment described in No. 3, above, cited a solitary provision of Massachusetts law which has been construed by the Massachusetts courts not to refer to numbers activity — a type of betting made illegal by another provision of Massachusetts law, not cited in the indictment.

In view of this fact, would a conviction on the basis of evidence of numbers activity be consistent with the requirement of the Sixth Amendment that a defendant be fairly informed of the charges against him, and of the Fifth Amendment that a defendant be tried only on the charges made by the grand jury that indicted him?

Constitutional Provision and Statute Involved.

The Fifth Amendment to the United States Constitution provides in pertinent part:

". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ."

Section 3731 of Title 18 of the United States Code provides in pertinent part:

> "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

Statement of the Case.

Petitioner Thomas Sanabria and fifteen others were indicted for allegedly violating 18 U.S.C. § 1955, which makes it a federal crime to engage in an "illegal gambling business." The federal statute defines such a business as one which, among other things, involves five or more persons and is in violation of state law. The one count indictment charged the defendants with engaging in:

> "an illegal gambling business [involving] . . . accepting, recording, and registering bets and wagers on a parimutual [sic] number pool and on the result of a trial and contest of skill, speed and endurance of beast . . . [in] violation of the laws of the Commonwealth of Massachusetts, to wit, M.G.L.A. Chapter 271, Section 17. . . ."

At trial, the Government introduced evidence purporting to show that the single gambling business charged in the indictment involved illegal state betting on (a) horse races, and (b) numbers. After both sides had rested, petitioner Sanabria and his codefendants moved[1] to strike as irrelevant that portion of the Government's evidence which pertained to numbers activity. They argued that the only Massachusetts statute cited in the indictment — Mass. G.L. c. 217, § *17* — had been interpreted by the Massachusetts courts to pertain exclusively to gambling activity involving apparatus used in betting based on a game of competition, such as horse racing. *See Commonwealth* v. *Boyle*, 346 Mass. 1, 189 N.E. 2d 844 (1963). They maintained that numbers activity was prohibited only by Mass. G.L. c. 217, § 7.

Persuaded by this argument, the district court held that the policy that criminal defendants receive notice of the charges against them would be violated if the numbers aspect of the case were permitted to proceed. Accordingly, the district court excluded the Government's evidence of numbers activity and ruled that the case could go to the jury solely on the Government's horse betting theory.

Petitioner Sanabria then moved for a judgment of acquittal on the ground that there was insufficient evidence of his involvement in horse betting gambling to support his conviction on this basis. Focusing on the evidence of horse betting against Sanabria, and finding that it was indeed insufficient, the district court granted his motion. The district court permitted the case against Sanabria's ten[2] codefendants to proceed, however, and the jury found each one guilty.

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[1] This was a renewal of a motion that the defendants had made previously, without success, at the close of the Government's case.

[2] As indicated earlier, the indictment names fifteen codefendants, but, for reasons not pertinent here, the number had decreased to ten codefendants by the time of trial.

The Government sought appellate review of the district court's decision to acquit Sanabria. It conceded that there could be no review of the ruling that there was insufficient evidence of Sanabria's involvement in horse betting to support a conviction on that theory. But it maintained that there could be review of the decision to exclude the evidence of numbers activity, and requested that a new trial be ordered to give the Government the opportunity to convict Sanabria on that theory.

Observing that the case presented "several substantial questions" concerning the Government's right to appeal from an adverse decision in a criminal case (A. 2a), the court of appeals found that the district court's decision to exclude the evidence of numbers activity was indeed reviewable under 18 U.S.C. § 3731. Turning to the merits, it ruled that the lower court had erred in "dismissing" the "numbers based charge" and remanded the case so that the Government could retry the defendant on this "portion of the indictment" (A. 12a).

Reasons for Granting the Writ.

The decision below conflicts with this Court's decisions in *United States* v. *Jenkins*, 420 U.S. 358 (1975), *United States* v. *Wilson*, 420 U.S. 332 (1975), and *Serfass* v. *United States* 420 U.S. 377 (1975). It raises important questions regarding the interpretation of 18 U.S.C. § 3731 and the double jeopardy clause, which should be settled by this Court. And it conflicts with the Eighth Circuit's decision in *United States* v. *Means*, 513 F. 2d 1329 (1975).

I. The Decision Below Violates the Holding of United States v. Jenkins Because it Authorizes "Further Proceedings . . . Devoted to the Resolution of Factual Issues" Following a Trial that Ended "in the Defendant's Favor."

In three cases decided in early 1975 — *United States* v. *Wilson*, 420 U.S. 332; *United States* v. *Jenkins*, 420 U.S. 358; and *Serfass* v. *United States*, 420 U.S. 377 — this Court formulated a bright line test for determining when the double jeopardy clause bars further prosecution of a defendant. That test provides that when, after a defendant is placed in jeopardy, a trial terminates "in [his] favor," the defendant is shielded from "further proceedings . . . devoted to the resolution of factual issues going to the elements of the offense charged." *United States* v. *Jenkins*, 420 U.S. at 365, n. 7, 370 (1975).[3]

[3] In *Serfass*, the Government appealed from a pretrial order dismissing the indictment. This Court upheld the Government's right to appeal because, by virtue of the fact that the trial court was without power to make any determination on defendant's pretrial motion regarding his guilt or innocence, the defendant had never been placed "in jeopardy." Accordingly, any further proceedings that might ensue on a successful Government appeal would not subject the defendant to double jeopardy. 420 U.S. at 389-392.

In *Wilson*, the Government sought review of a postverdict decision dismissing the indictment for prejudicial delay in bringing the defendant to trial. This Court ruled that the appeal was permitted because any error of law in the trial court's decision could be corrected, and the guilty verdict could be reinstated, "without subjecting [the defendant] to a second trial before a second trier of fact." 420 U.S. at 345.

In *Jenkins*, the Government appealed from a decision dismissing the indictment following a bench trial. Stating that it could not determine "with assurance whether [the trial court's decision] was, or was not, a resolution of the factual issues against the Government" (420 U.S. at 369-370), this Court, nevertheless, found that the Government's appeal was barred because there was no adjudication of guilt that could be reinstated in the event the appeal was successful. Further proceedings bearing on factual issues going to the elements of the offense charged would be necessary and, even if all that was required was for the trial court to make supplemental findings on the basis of evidence already received, that would suffice to raise the bar of double jeopardy. 420 U.S. at 370.

When this test is applied here, it is plain that the Government's appeal from the judgment acquitting Sanabria is constitutionally barred. Sanabria was placed in jeopardy; the trial terminated in his favor; and, if a Government appeal were successful, further proceedings would be necessary to establish his guilt. Under *Jenkins*, the basis of the ruling in Sanabria's favor is immaterial.[4] "[I]t is enough for purposes of the Double Jeopardy Clause . . . that further proceedings . . . would . . . [be] required upon reversal and remand." 420 U.S. at 370.

[4] The only possible exception to this was indicated in *Serfass* v. *United States*, 420 U.S. at 394, where this Court expressly reserved judgment on the hypothetical situation of

> "a defendant who is afforded an opportunity to obtain a determination of a legal defense prior to trial and nevertheless knowingly allows himself to be placed in jeopardy before raising the defense."

The court below alluded to this hypothetical but ruled that it was not presented by this case. The court reached this conclusion because it interpreted the reserved issue to refer only to the situation of a defendant "who prevails at trial because of the trial judge's interpretation of the substantive criminal law" (A. 9a), that is, a defendant who receives a legal determination that his "conduct was such that criminal liability [cannot] be imposed" (A. 9a). The court found that petitioner Sanabria did not fit into this category because the dismissal he received was not based on an evaluation of the conduct alleged but merely on a determination that he had not received proper notice of the numbers charge.

Petitioner Sanabria agrees that he does not come within the hypothetical described in *Serfass* but not for the reason indicated by the court of appeals. In fact, Sanabria does not come within the hypothetical because he was acquitted, not on the basis of a legal defense which he could have raised before trial, but rather on the basis of a factual determination that could only have been made at trial.

II. The Lower Court's Attempt to Distinguish Jenkins not Only Fails; it Articulates Unprecedented Doctrines which would Subvert the Entire Structure of Double Jeopardy Analysis Adopted by this Court.

In attempting to justify the Government's right to appeal in the face of *Jenkins*, *Wilson* and *Serfass*, the court of appeals sought to establish four propositions:

1. For purposes of 18 U.S.C. § 3731 and the double jeopardy clause, the district court's ruling that the evidence of horse betting was insufficient to support conviction is separable from its ruling that the evidence of numbers activity had to be excluded (A. 4a-7a).

2. The district court's decision with respect to numbers activity was in reality not an "evidentiary ruling," but was rather a ruling that the indictment failed to charge a violation of 18 U.S.C. § 1955 on a numbers theory (A. 6a, n. 5).

3. Even though this ruling on the insufficiency of the indictment was admittedly made after jeopardy attached, a future prosecution will not offend the Constitution because "[n]either the judge nor the jury ever focused on what the evidence of numbering activities established regarding defendant's conduct or on whether the alleged conduct was such that criminal liability could be imposed" (A. 8a).

4. Sanabria's motion to exclude the evidence of numbers activity was the equivalent of a motion for a mistrial not occasioned by prosecutorial or judicial overreaching (A. 10a-11a).

Each of these propositions is a necessary link in the chain of reasoning adopted by the court of appeals. If any one of these propositions is invalid, the court's conclusion cannot stand. In fact, all four of the propositions are invalid. We will consider them in turn.

A. *The Judgment of Acquittal was Unitary and Indivisible: The District Court's Ruling on Numbers Activity Cannot be Separated from its Ruling on Horse Betting.*

The first proposition is mistaken because the district court's ruling on horse betting *cannot* be separated from its holding on numbers activity without doing violence both to the indictment and to the judgment of acquittal. Reading the indictment most favorably to the Government, it charges the defendants with engaging in an illegal gambling business that encompassed two types of betting: (a) betting "on a pari-mutual [*sic*] number pool"; and (b) betting "on the result of a trial and contest of skill, speed and endurance of beast." The court of appeals argued that because of the enumeration of these two types of betting Sanabria

> "could possibly have made a pretrial objection to the indictment as duplicitous. If he had, the probable response of the district court would have been to give the government the option of proceeding on either a numbers theory or a horse betting theory. *See* 8 Moore's Federal Practice ¶8.04[1]. We can safely assume that, as to [Sanabria], the government would have opted for the former and that the case would have been tried solely on a numbers theory, a fact which would have required the district court formally to dismiss an entire count of the indictment when it ruled on defendant's motion." (A. 5a, n. 4.)

The short answer to this argument is that what motion Sanabria "could possibly have made," what the district court's "probable response" would have been, and what one can "safely assume" the Government "would have opted for" have

nothing to do with this case. Sanabria's rights must be determined on the basis of what happened, not what could have happened. What happened was that Sanabria was tried on a one count indictment encompassing both horse betting and numbers betting, and that, after being placed in jeopardy, he was acquitted. No amount of speculation can change these basic facts.

The second answer to the court's argument is that the indictment was *not* duplicitous. Duplicity is defined as "charging multiple offenses in a single count." 8 J. Moore, Federal Practice ¶8.03[2], p. 8-7 (2d ed., Nov. 1976 revisions). *Accord*, 1 Wright, Federal Practice and Procedure § 142 (1969). It is distinguished from charging the commission of a single offense by different means, a "technique of pleading . . . specifically authorized by [Fed. R. Crim. P. 7(c)] and . . . used by prosecutors to avoid variances between pleading and proof." *Ibid.*

The distinction between these two concepts is illustrated in *Driscoll* v. *United States*, 356 F. 2d 324, 331-332 (1st Cir. 1966). The defendants there challenged as duplicitous a count charging them with a violation of the wagering tax laws on the ground that the count accused each of them as both principal and agent, and hence with two crimes. The court rejected the challenge, however, because it found that the gravamen of the offense was "engaging in the business of accepting wagers either as principal or agent." 356 F. 2d at 331. Consequently, the court held that the case came within the rule permitting a single count to allege that "the defendant committed the offense . . . by one or more specified means." *Ibid.*

The same ruling applies here. 18 U.S.C. § 1955 makes it a federal crime to engage in "an illegal gambling business." The indictment in this case accused Sanabria and his codefendants with participating in such a business. Only one

"illegal gambling business" and one crime was charged. The indictment enumerated two types[5] of betting, not for the purpose of charging the existence of two discrete gambling businesses — and hence two crimes — but rather for the purpose of describing, in the alternative, two types of activity which the single gambling business encompassed. Consequently, since only one gambling business was alleged, and only one violation of § 1955 was charged, the indictment was not duplicitous. Indeed, if the charge of horse betting and numbers betting had been split into two counts, the indictment would have been subject to challenge as multiplicitous — that is, as charging one offense in two counts. *See* 1 Wright, Federal Practice and Procedure § 142 (1969).

Because the indictment here was never challenged as duplicitous, and could not properly have been found duplicitous even if it had been challenged, the district court's judgment of acquittal cannot be validly separated into horse betting and numbers activity components. The judgment of acquittal was a unitary judgment that Sanabria was not guilty under the single count indictment. Consequently, the Government cannot consistently concede, on the one hand, that there *cannot* be review of the district court's ruling on horse betting, and maintain, on the other, that there *can* be review of the district court's decision on numbers betting. There was only one indictment in this case and Sanabria's trial under that indictment terminated in a judgment of acquittal. To permit the Government to dissect and worry that result for the purpose of extracting a basis for further prosecution is to invite precisely those evils which the double jeopardy clause was designed to prevent. Indeed, such a ruling would provide a pernicious precedent that:

[5] This is assuming arguendo that the indictment adequately charged numbers, as well as sports, betting — a position petitioner rejected below and continues to reject here. See point IV below.

> "would allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first; it would permit him to re-examine the weaknesses in his first presentation in order to strengthen the second; and it would disserve the defendant's legitimate interest in the finality of a verdict of acquittal." *United States* v. *Wilson*, 420 U.S. at 352.

B. *The Ruling on Numbers Activity was an Evidentiary Ruling.*

18 U.S.C. § 3731 provides that the Government may appeal from a decision

> "suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, *not* made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information . . ." (emphasis added).

The plain implication of this provision is that the Government may *not* appeal a decision excluding evidence made after the defendant has been placed in jeopardy. The court of appeals expressly recognized this and also seemed to recognize that, under *Fong Foo* v. *United States*, 369 U.S 141 (1962), the same conclusion is compelled by the double jeopardy clause (A. 6a, n. 5). Nevertheless, the court of appeals held that the Government could appeal here because Sanabria's characterization of the district court's action as an evidentiary ruling was "inaccurate." *Ibid.* According to the court of appeals, the district court's "critical ruling" was that "the indictment failed to charge a violation of § 1955 on a numbers theory." *Ibid.* That the numbers evidence was "subsequently formally excluded" was in the view of the court of appeals "immaterial since the earlier ruling rendered the evidence irrelevant in any case." *Ibid.*

The court of appeals' reasoning is strained, to say the least. Petitioner was tried with ten codefendants, all of whom joined in the motion with respect to the numbers evidence. Following the district court's determination of that motion — which, it should be noted, the court characterized as a "motion to strike" — the court and counsel for both sides engaged in the laborious process of separating the documentary horse betting evidence from the documentary numbers evidence so that the latter could be excluded. The case went to the jury on the horse betting evidence, and all of Sanabria's codefendants were convicted. In the face of this process, the contention that the district court's action was not "an evidentiary ruling" is simply not tenable.

As for the court of appeals' argument that the district court's ruling was not truly "evidentiary" because it was predicated on a ruling pertaining to the indictment, it need only be pointed out that there are countless times when a trial court is called upon to make a ruling on the relevance of a piece of testimony that requires it to determine the legitimate scope of the indictment. The fact that such rulings require underlying decisions regarding the indictment, however, hardly deprive them of their character as evidentiary rulings. But, under the court of appeals' formula, the Government would have a legitimate claim to appeal each of those rulings. Needless to say, that would plainly contradict the intent of § 3731 and this Court's interpretation of the double jeopardy clause.[8]

[8] The dispute which has arisen in this case over whether the district court's decision was or was not an evidentiary ruling leads to a more fundamental point. The very purpose of having the bright line test articulated in *Jenkins*, *Wilson* and *Serfass* is to avoid disputes over the type of hair-splitting distinctions in which the court of appeals' decision is entangled. Consequently, the whole inquiry into whether the district court's decision was or was not an evidentiary ruling is misguided, and the reasoning of the court of appeals must be rejected for this reason alone.

C. *Sanabria's Right to Double Jeopardy Protection is in No Way Diminished by the Fact that the District Court's Ruling on Numbers Activity can be Characterized as a Legal rather than a Factual Determination.*

Serfass, *Wilson* and *Jenkins* are unanimous in rejecting the notion that the character of a trial court's decision as either legal or factual has any impact on the consequences of that decision under the double jeopardy clause.

In *Serfass*, this Court permitted an appeal from a pretrial order despite the fact that the order was based on factual findings that could have constituted a defense on the merits at trial. In *Wilson*, the Court allowed an appeal from a post-verdict order notwithstanding that the order was predicated on factual determinations adduced from evidence presented at trial. In *Jenkins*, the Court found that an appeal was barred by the double jeopardy clause even though the Court stated it could not determine whether the order appealed from was "a resolution of the factual issues against the Government." 420 U.S. at 369-370. As the New York Court of Appeals stated in *People* v. *Brown*, 40 N.Y. 2d 381, 392 (1976), *pet. for cert. filed*, 45 U.S.L.W. 3284 (Sept. 7, 1976):

> "In Jenkins [the Supreme Court] could not have been more explicit in making it clear that the legal-factual dichotomy plays no role and that the concern of the double jeopardy clause extends no further than to question whether retrial might follow a successful prosecution appeal. . . ."

Thus, in finding that Sanabria's right to the protection of the double jeopardy clause was diminished because

> "[n]either the judge nor the jury ever focused on what the evidence of numbering activities established regarding defendant's conduct or on whether the alleged conduct was such that criminal liability could be imposed" (A. 8a),

the court below totally misconstrued this Court's decisions.

D. *Sanabria's Motion to Strike the Evidence of Numbers Activity was Not the Equivalent of a Motion for a Mistrial.*

The court of appeals found that Sanabria's motion to strike the evidence of numbers activity was tantamount to a defendant's voluntary motion for a mistrial because

> "as in the mistrial context, defendant elected to forego his valuable right to have his trial on numbers charges concluded by the first tribunal" (A. 11a).

This finding was plainly wrong for two reasons.

First, the set of expectations a defendant has when he voluntarily moves for a mistrial are entirely different from the expectations Sanabria had when he made his motion to exclude the evidence of numbers activity. A defendant voluntarily moving for a mistrial knows that, if his motion is granted, his trial will not be definitively concluded. Consequently, a defendant making such a motion can be fairly said to have consciously relinquished his valuable right to have his trial completed. When Sanabria made his motion, however, he knew that, if his motion was granted, and if the district court found that the evidence of his involvement in horse betting was insufficient, the trial would end in his favor. Thus, Sanabria did not in any sense relinquish his right to have his trial "concluded" and it is grossly unfair to regard him as if he had. Indeed, Sanabria no more relinquished his trial rights than any other defendant who requests an evidentiary ruling in his favor during the course of a trial.

Second, this Court has rejected the type of double jeopardy analysis, adopted by the court of appeals here, that would export mistrial standards to situations where mistrials did not in fact occur. When the *Jenkins* case was before the Second Circuit, Judge Lumbard took the view that the Government's appeal should be allowed under the same principles that allowed further prosecution following a mistrial. In finding that the appeal should not be allowed, this Court explicitly rejected Judge Lumbard's analysis because it determined that:

> "it is of critical importance whether the proceedings in the trial court terminate in a mistrial as they did in the *Somerville* line of cases, or in the defendant's favor, as they did here." 420 U.S. at 365, n. 7.

The Eighth Circuit reached a similar result in *United States* v. *Means*, 513 F. 2d 1329 (1975), where the Government sought review of a district court's mid-trial decision to dismiss the indictment on the grounds of prosecutorial misconduct. The Government argued that, for purposes of 18 U.S.C. § 3731 and the double jeopardy clause, the Eighth Circuit should find that before the district court's dismissal was entered "a mistrial occurred by operation of law." As the Supreme Court did in *Jenkins*, however, the Eighth Circuit rejected the mistrial analogy:

> "The situation presented herein is a trial which terminated in defendants' favor after jeopardy had attached, before a finding of guilt by the trier of fact, and with no determination by the trial court that due process precludes a retrial or that 'manifest necessity' or the ends of justice require a retrial." 513 F. 2d at 1333.

Precisely the same thing can be said of the instant case. Just as the mistrial analogy was rejected in *Jenkins* and *Means*, it must be rejected here.

III. The Decision Below Resolves Two Important Issues Regarding the Interpretation of 18 U.S.C. § 3731 and the Double Jeopardy Clause Never Decided by This Court — and Resolves them in a Way that Cannot be Permitted to Stand.

In the opening sentence of its opinion, the court of appeals declared that this case presents "substantial questions" concerning the Government's right to appeal from an adverse decision in a criminal case (A. 2a). These questions are indeed so substantial, and the lower court's treatment of them so inadequate, that they should be resolved by this Court.

A. *The Government's Right to Appeal from a Dismissal of a "Discrete Basis of Criminal Liability" that is Less than an Entire Count of an Indictment.*

18 U.S.C. § 3731 permits the Government to appeal from a district court decision "dismissing an indictment or information as to any one or more counts." The decision below, however, would permit the Government to appeal from a decision dismissing "any discrete basis of criminal liability"

regardless of whether that "basis of liability" constituted an entire count (A. 6a-7a). Such an "interpretation" not only offends the language of the statute; it also plainly violates the double jeopardy clause and undermines the integrity of judgments of acquittal.

One of the primary purposes of the double jeopardy clause is to protect the "defendant's legitimate interest in the finality of a verdict of acquittal." *United States* v. *Wilson*, 420 U.S. at 352, and n. 21. The rule proposed by the court below, however, would seriously subvert that interest because it would permit the Government to go behind judgments of acquittal in search of "appealable" legal rulings made during the course of trial that dismissed "discrete bases of criminal liability." That is to say, under such a rule, a judgment acquitting a defendant on a count of an indictment would no longer be final because the Government would still have the opportunity to appeal if it could show that the count encompassed "discrete bases of criminal liability" which had not been adjudicated on the facts but which had been dismissed on legal grounds. Indeed, the net result of such a rule would be very close to allowing the Government to appeal from all legal errors made during the course of a trial — a result expressly and consistently rejected by this Court. *E.g.*, *United States* v. *Jenkins*, 420 U.S. at 369; *United States* v. *Wilson*, 420 U.S. at 352. It is, therefore, essential that the rule proposed by the lower court be reviewed by this Court, and reversed.

B. *The Double Jeopardy Consequences of a Dismissal for Failure to Provide a Defendant with Sufficient Notice of the Charges Against Him.*

The court below observed that this Court has never passed on:

> "the issue of the double jeopardy consequences of a dismissal of a count of an indictment by reason of its failure to provide the criminal defendant with sufficient notice of the charges against him" (A. 7a).

The lower court then proceeded (at A. 8a) to distinguish such a dismissal both from

(1) adjudications that the defendant did not commit the crime charged; and

(2) adjudications that the alleged conduct was such that even if the defendant committed it, liability could not be imposed.

Because such a dismissal is not in either of these categories, the court argued, its double jeopardy consequences are minimal — so minimal, in fact, that the Government may appeal from such a dismissal regardless of whether it is entered after jeopardy has attached, and regardless of whether it becomes merged, as it did in this case, in a judgment of acquittal.

Both this conclusion, and the reasoning which the lower court followed to reach it, are woefully misguided. Indeed, the notion that dismissals are to be divided into three separate categories with three different sets of double jeopardy consequences is the antithesis of the bright line scheme which this Court began to establish in *Jenkins*, *Wilson* and *Serfass*. To reaffirm that scheme, and to fulfill the goals of simplicity, fairness, and predictability which it was designed to meet, this Court should review the lower court's decision and reject the categorization of dismissals which it needlessly proposes.

IV. The Court Below Decided Incorrectly an Important Question Involving a Defendant's Constitutional Right To Receive Notice of the Charges Against Him and to be Tried Only on the Charges Made by the Grand Jury that Indicted Him. This Decision Conflicts with the Fifth Circuit's Ruling in United States v. Prejean, 494 F. 2d 495 (1974).

The district court found that the indictment did not give adequate notice that the Government was proceeding against the defendant on a numbers, as well as on a horse betting theory, because the indictment cited a solitary provision of Massachusetts law which had been expressly construed to reach only gambling activity involving apparatus used in betting based on a game of competition, such as horse racing. The Massachusetts courts had consistently found that numbers betting was to be prosecuted under another provision of Massachusetts law, which the Government had not cited in the indictment.

In *United States* v. *Morrison*, 531 F. 2d 1089, 1094 (1st Cir. 1976), decided after the district court's ruling but before the decision below, the First Circuit, in confronting an indictment substantially identical to the one here, tacitly accepted this reading of Massachusetts law. Nevertheless, it found that the failure to cite the proper state statute was "harmless error" in view of the fact that the indictment did refer to "a pari-mutuel number pool."

In reaching this conclusion, the court incorrectly relied on Fed. R. Crim. P. 7(c)(3), a provision which plainly refers to errors in the citation of the statute of the crime charged — see the last sentence of Fed. R. Crim. P. 7(c)(1) — and can be of no aid to the Government where the statutory citation is substantively required as an essential element of the crime. In fact, as the Fifth Circuit held in *United States* v. *Prejean*, 494

F. 2d 495 (1974), the requirements for accuracy in a statutory citation serving this substantive purpose must be stringent indeed to protect a defendant's Sixth Amendment right to be fairly and unambiguously informed of the charges against him, and his Fifth Amendment right to be tried only on the charges made by the grand jury that indicted him. *See Cole* v. *Arkansas*, 333 U.S. 196 (1948); *Commonwealth* v. *Edelin*, Mass. Adv. Sh. (1976) 2795.

The defect in the indictment here was hardly a harmless miscitation. It was, rather, a substantive error of constitutional dimension that, at the least — taking the view most favorable to the Government — created a real ambiguity as to the precise charge on which the defendants had been indicted and on which the Government was proceeding. Consequently, the district court's decision to exclude the evidence of numbers activity was unquestionably correct, and the contrary ruling of the First Circuit must be reversed.

Conclusion.

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANCIS J. DIMENTO,
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January 28, 1977

Appendix A.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

No. 76-1016.

UNITED STATES OF AMERICA,
APPELLANT,

v.

THOMAS SANABRIA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.
[Hon. Walter Jay Skinner, *U.S. District Judge*]

Before Coffin, *Chief Judge*,
McEntee and Campbell, *Circuit Judges*.

Frederick Eisenbud, Attorney, Department of Justice, with whom *James N. Gabriel*, United States Attorney, *Stephen H. Jigger*, Special Attorney, Department of Justice, and *Sidney M. Glazer*, Attorney, Department of Justice, were on brief, for appellant.

Francis J. DiMento, with whom *DiMento & Sullivan* and *Donald C. Tye* were on brief, for appellee.

December 29, 1976

COFFIN, *Chief Judge*. This case presents several substantial questions concerning the conditions under which the United States may appeal from an adverse decision in a criminal case.

In November, 1972, defendant-appellee Thomas Sanabria and fifteen others were indicted for conducting an illegal gambling business, encompassing both a numbers and a horse betting operation, in violation of 18 U.S.C. § 1955.[1] The one count indictment charged them with "accepting, recording and registering bets and wagers on a parimutual [sic] number pool and on the result of a trial and contest of skill, speed, and endurance of beast . . . a violation of the laws of the Commonwealth of Massachusetts, to wit, M.G.L.A. Chapter 271, Section 17. . . ." Following some three years of pre-trial activity, a jury trial of defendant and ten co-defendants commenced on November 10, 1975 in the federal district court for the district of Massachusetts. At trial, the government introduced evidence tending to show that defendants were involved in an illegal numbers and horse betting gambling business in Massachusetts.

After both sides had rested, defendant moved for a judgment of acquittal. He argued first that there was insufficient evidence of his involvement in horse betting gambling to support a conviction upon that theory and second that, regardless of the evidence of numbers activity, the government had failed sufficiently to allege a violation of the Massachusetts laws prohibiting such conduct and could not prosecute him on a numbers theory. Defendant reasoned that the only Massachusetts statute which was cited, Mass. Gen. Laws c. 217 § 17,

[1] Section 1955 makes it a federal crime to conduct an illegal gambling business that involves five or more persons and that is in substantially continuous operation for a period in excess of thirty days. It provides that "illegal gambling business" means "a gambling business which is a violation of the law of a State or political subdivision in which it is conducted."

has been interpreted by the Massachusetts courts as not to prohibit numbers activity, which, under the case law, is proscribed exclusively by *id.* § 7, *see Commonwealth* v. *Boyle*, 346 Mass. 1, 189 N.E. 2d 844 (1963). He therefore urged that there had not been a sufficient allegation of illegal numbers activity to permit the government to obtain a guilty verdict on that basis. This objection to the indictment had not been raised either in the pre-trial motions or in any objection to the introduction of evidence during the trial.[2]

The district court was persuaded by defendant's argument regarding Massachusetts law, and presumably because it thought that the citation of § 17 alone could have led a criminal defendant to believe that the government was not proceeding on a numbers theory, it held that the policy that criminal defendants receive notice of the charges against them would be violated if the numbers aspect of the case were permitted to proceed. Having concluded that the indictment could not be interpreted to charge accepting bets on a parimutuel numbers pool, the district court excluded the government's evidence of numbers activity. It then focused on the evidence of horse betting and, finding it insufficient, entered a judgment of acquittal for defendant.

The government now seeks appellate review of the district court's action. It concedes that there can be no review of the district court's ruling that there was insufficient evidence of horse betting to support a conviction. However, it seeks review of the district court's decision to exclude the charge based upon numbering activities, and it requests that we order a new trial on this portion of the indictment. If we have appellate jurisdiction, there is no question but that the govern-

[2] The record reflects that defendant was aware of the alleged defect in the indictment before the trial began. In a post-judgment colloquy with the trial judge, defendant's counsel stated that he had been prepared to raise his objections at the beginning of trial.

ment is entitled to the relief it seeks.[3] In *United States* v. *Morrison*, 531 F. 2d 1089, 1094 (1st Cir. 1976), which had not been decided at the time of the district court's action, we held that an indictment which was identical to that in the case at bar in all significant respects was sufficient to place the criminal defendant on notice that numbers activity was a basis upon which the government sought to establish criminal liability under § 1955. Defendant concedes that *Morrison* is controlling if we have appellate jurisdiction.

Since the government may appeal an adverse judgment in a criminal case only when authorized by statute, *see United Sanges*, 144 U.S. 310 (1892), the first question we must face is whether a statute authorizes this appeal. The relevant statutory provision, 18 U.S.C. § 3731, provides in pertinent part:

> "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> . . . . . .
>
> "The provisions of this section shall be liberally construed to effectuate its purposes."

[3] Although neither party addresses this point, we observe that we see no problem with permitting a trial on only a portion of a count of an indictment. As we discuss later, see n. 4, "severance" of a count is the general practice when a count of an indictment is duplicitous, *see* 8 Moore's Federal Practice ¶8.04[1], and this strongly suggests that there is no barrier to having a retrial proceed on only that portion of the indictment which charges a § 1955 violation on a numbers theory.

In deciding whether the present appeal is authorized thereunder, we must determine. first, whether the district court's action was the dismissal of an indictment "as to any one or more counts" within the meaning of § 3731, and, second, whether the double jeopardy clause will prohibit further proceedings against the defendant under § 1955 based upon allegations of numbers activity. The latter question, of course, pertains both to our appellate jurisdiction and to the constitutionality of such further proceedings against defendant.

The first issue arises because the district court's action was not formally a dismissal of an entire count. The portion of the indictment that charged pari-mutuel numbers activity was part of the same count that charged horse betting; after the district court removed the numbers charge from the case, the single count of the indictment still charged a crime. Although the district court did not remove an entire count from the indictment, its action clearly eliminated one basis for imposing criminal liability on defendant.[4] We think this fact is suf-

[4] If the government had succeeded in establishing that defendant had engaged in a gambling business which registered bets on a pari-mutuel numbers pool and which satisfied the other requirements of § 1955, it would plainly have proven a violation of that statute. And such a charge could have been the subject of a separate count in an indictment.

We observe that defendant could possibly have made a pretrial objection to the indictment as duplicitous. If he had, the probable response of the district court would have been to give the government the option of proceeding on either a numbers theory or a horse betting theory. *See* 8 Moore's Federal Practice ¶8.04[1]. We can safely assume that, as to this defendant, the government would have opted for the former and that the case would have been tried solely on a numbers theory, a fact which would have required the district court formally to dismiss an entire count of the indictment when it ruled on defendant's motion.

The possibility of such a scenario fortifies our conclusion that the word "count" in 18 U.S.C. § 3731 should be liberally construed. We can see no reason why the government's ability to appeal should depend upon whether the defendant previously challenged the indictment as duplicitous.

ficient, assuming no double jeopardy bar, to make the district court's action reviewable at the behest of the government.[5]

By permitting appeals from orders dismissing single counts of an indictment, Congress manifested an intention that district court orders eliminating a single ground of criminal liability from a prosecution would normally be appealable. We can think of no substantial policy which would be served by prohibiting government appeals from an order dismissing a criminal charge when that charge did not formally comprise an entire count of an indictment. The sole practical effect of such a narrow construction of § 3731 would be that, in such cases only, the government would be obliged to reindict the criminal defendant before attempting to reprosecute. There is no indication, either in the statute or its legislative history, that the use of the word "count" was intended either to limit the instances in which the government could appeal or to force the government, in certain instances, to reindict the criminal defendant before it could attempt to proceed against him anew. On the contrary, the legislative history indicates that Congress intended to remove all statutory barriers to government appeals and permit appeals from an unfavorable termination of a criminal charge whenever the double jeopardy clause does not prohibit further proceedings. *See United*

[5] Noting that the evidence of numbering activity was excluded from the case, defendant attempts to characterize the district court's action as a judgment of acquittal which arose from an erroneous evidentiary ruling and, citing *Fong Foo* v. *United States*, 369 U.S. 141 (1962), argues that no appeal may be taken. Although § 3731 seems also to support the conclusion that an evidentiary ruling made after jeopardy had attached cannot form the basis for an appellate challenge to a judgment of acquittal, defendant's characterization of the district court's action is inaccurate. The critical ruling by the district court was that the indictment failed to charge a violation of § 1955 on a numbers theory. This ruling was in no way predicated upon an erroneous evidentiary ruling. That the numbers evidence was subsequently formally excluded is immaterial since the earlier ruling rendered the evidence irrelevant in any case.

States v. *Wilson*, 420 U.S. 332, 337-39 (1975). Noting also that the last sentence in § 3731 provides that it is to be "liberally construed to effectuate its purposes", we interpret the word "count" in the statute to refer to any discrete basis for the imposition of criminal liability that is contained in the indictment. Here, the district court effectively dismissed the portion of the indictment charging a § 1955 violation based on the defendant's alleged numbering activities. Under our construction of § 3731, therefore, this order is appealable if the double jeopardy clause does not bar a future prosecution on this charge.

Turning to this question, we find that the issue of the double jeopardy consequences of a dismissal of a count of an indictment by reason of its failure to provide the criminal defendant with sufficient notice of the charges against him has not been addressed by the Supreme Court. However, a series of recent decisions of the Court persuades us that the policies embodied in the double jeopardy clause will not be offended if defendant is prosecuted sometime in the future for allegedly engaging in numbers activities under circumstances constituting a § 1955 violation.

The double jeopardy clause comes into play only when the criminal defendant has previously been "placed in jeopardy" on the charges in question. *Serfass* v. *United States*, 420 U.S. 377 (1975). Here, there appears to be no question but that defendant was placed in jeopardy on the numbers charge since the jury was empaneled and sworn, *see Downum* v. *United States*, 372 U.S. 734 (1963). Although it might plausibly be argued that the district court's conclusion that defendant had not been charged on a numbers theory prevented jeopardy from attaching, *cf. Kepner* v. *United States*, 195 U.S. 100, 133 (1904), it apparently is settled that jeopardy attaches upon the institution of trial proceedings, even if the indictment is

defective. *See Illinois* v. *Somerville*, 410 U.S. 458, 466-67 (1973); *United States* v. *Ball*, 163 U.S. 662 (1896).

The fact that defendant was placed in jeopardy of course "begins, rather than ends, the inquiry." *Illinois* v. *Somerville*, *supra*, 410 U.S. at 467. The fundamental value embodied in the clause is the belief that, since repeated prosecutions cause a variety of hardships, subject the defendant to a continuing state of anxiety, and enhance the possibility that, although innocent, he may be found guilty, the state with its vast resources should not be permitted repeatedly to attempt to convict an individual for an alleged offense. *See Green* v. *United States*, 355 U.S. 184, 187-88 (1957). Since a second prosecution of an individual does not always seriously implicate this fundamental value and since there is a countervailing public interest in having criminal prosecutions terminate in just judgments, criminal defendants have never been held to have an absolute right to be placed in jeopardy only once on any given criminal charge. *See United States* v. *Jorn*, 400 U.S. 471, 484 (1971) (plurality opinion); *United States* v. *Tateo*, 377 U.S. 463, 466 (1964). Although the policies protected by the double jeopardy clause are implicated the instant jeopardy attaches, the public and private interests at stake are such that whether a criminal defendant who has once been the subject of a criminal prosecution will enjoy protection against future proceedings depends upon the reason the first prosecution ended.

The numbers based proceeding against defendant was terminated solely because he was deemed not to have received sufficient notice of the charges against him. Neither the judge nor the jury ever focused on what the evidence of numbering activities established regarding defendant's conduct or on whether the alleged conduct was such that criminal liability could be imposed. Because of this fact, a future prosecution in this case will not threaten one of the principal private interests protected by the clause: the criminal defendant's

interest in preserving a district court's ruling that he is not criminally responsible. Here, the trier of fact had no occasion to consider whether defendant engaged in conduct that constituted a violation of § 1955. Accordingly, there is no question of the state attempting "to persuade a second trier of fact of the defendant's guilt after having failed with the first."[6] *United States* v. *Wilson*, *supra*, at 352. Neither was the numbers based charge dismissed because the judge made a purely legal determination that the defendant's alleged conduct was such that criminal liability could not be imposed. Thus, this case does not present the difficult,[7] and presently open, *see Serfass* v. *United States*, *supra*, at 394, question whether a defendant, who prevails at trial because of the trial judge's interpretation of the substantive criminal law, but who had an opportunity to raise his defense on the merits pretrial, has a right under the double jeopardy clause not to be prosecuted again. *Compare United States* v. *Kehoe*, 516 F.

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[6] Where a trial terminates after the trier of fact resolved, or may have resolved, the factual issues determinative of criminal liability favorably to the defendant, the clause bars all further proceedings on that charge. *United States* v. *Jenkins*, 420 U.S. 358 (1975). But where the trier of fact initially resolved these factual issues against the criminal defendant, a future proceeding or prosecution does not violate the clause, *see United States* v. *Pearce*, 395 U.S. 711, 717 (1969), even when, following the determination by the trier of fact, the court entered a judgment of acquittal on the merits. *United States* v. *Wilson*, *supra*.

[7] That issue is a difficult one because the criminal defendant has received a determination, after jeopardy attached, that he must prevail on the merits. Although the foregoing suggests that the most fundamental values protected by the clause are substantially implicated in such a case, the matter is complicated since the defendant could have raised his legal defense on the merits prior to trial, before any of the values protected by the clause were implicated. The decision of this question requires a delicate accommodation between the private interests at stake and the public interest in having criminal convictions end in just judgments. Happily, we need not attempt to strike this balance here.

2d 78, *rehearing and rehearing en banc denied*, 521 F. 2d 815 (5th Cir. 1975), *cert. denied*, ___ U.S. ___ (1976) *with United States* v. *Lucido*, 517 F. 2d 1 (6th Cir. 1975) *and People* v. *Brown*, 40 N.Y. 2d 446, 19 Crim. L. Rep. 2318 (New York June 17, 1976), *petition for cert. filed*, 45 U.S.L.W. 3317 (Oct. 4, 1976).

What is involved, however, is the criminal defendant's general interest in being tried only once. This is a substantial interest but one which frequently is subordinated to the public interest in having prosecutions terminate in just judgments. As a general matter, when a prosecution ends without a ruling on the criminal defendant's criminal liability as such, a future prosecution will not offend the double jeopardy clause so long as neither the prosecutor nor the judge had been able to manipulate events so that the defendant would be forced to "forego his valued right to have his trial completed by a particular tribunal." *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949). Typically, the issue arises in cases in which the first prosecution terminated with a declaration of a mistrial, and here the rules are clear. When the mistrial is declared either sua sponte or upon a motion by the prosecutor, there will be no double jeopardy bar to future proceedings if "manifest necessity" or "the ends of public justice" required the mistrial order. *See United States* v. *Sanford*, ___ U.S. ___ (Oct. 12, 1976); *Illinois* v. *Somerville*, *supra*. More significantly for this case, when the defendant moves for a mistrial as the result of developments in the prosecution which are not attributable to prosecutorial or judicial overreaching, the motion "is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial errors." *United States* v. *Jorn*, *supra*, at 485; *see United States* v. *Dinitz*, ___ U.S. ___ (March 8, 1975).

We believe the cases permitting future prosecutions of defendants whose first trials ended in mistrials following their

motions control this case. Here, as in the mistrial context, defendant elected to forego his valuable right to have his trial on numbers charges concluded by the first tribunal. He did so because he believed — incorrectly as it turns out — that, because of a prosecutorial error, the indictment insufficiently alleged a § 1955 violation on a numbers theory. Defendant has not made, nor can he make, any suggestion that the government intentionally manipulated events to gain some advantage at the first trial or to force defendant to forego his right to proceed before the first tribunal. Indeed, both the record in the case and the logic of our decision in *United States* v. *Morrison*, *supra*, virtually compel the conclusion that the indictment placed defendant at no disadvantage at the first trial. Since defendant voluntarily requested termination of proceedings based upon the numbers activities before there had been any determinations regarding either his conduct or its legal consequences, and since there can be no suggestion that defendant's request was attributable to developments resulting from prosecutorial or judicial overreaching, we hold that there is no double jeopardy bar to a future prosecution on this cause. In so holding, we note that we are following at least one of our sister circuits. *See United States* v. *DiSilvio*, 520 F. 2d 247 (3d Cir.), *cert. denied*, 423 U.S. 1015 (1975).

We observe that had the government foreseen the possible objection to the indictment during the trial, called it to the court's attention, and requested the court to declare a mistrial if it believed such an objection would be well taken, *Illinois* v. *Somerville*, *supra*, would appear to compel the conclusion that the double jeopardy clause would not have barred further proceedings following a declaration of mistrial. Certainly, the government's right to institute further proceedings cannot be any the less when the defendant, not it, makes the motion that results in the termination of a cause.

We conclude that the district court's action in dismissing the numbers based charge is reviewable under § 3731. As we have already indicated the district court, not having the benefit of *Morrison*, erred in terminating this aspect of the prosecution. The judgment of the district court is, therefore, vacated and the case is remanded so that the government may try defendant on that portion of the indictment that charges a violation of § 1955 based upon numbering activities.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

No. 76-1016.

UNITED STATES OF AMERICA,
APPELLANT,

v.

THOMAS SANABRIA,
DEFENDANT, APPELLE.

JUDGMENT

Entered December 29, 1976

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: That portion of the judgment that acquitted the defendant of the charge of a violation of § 1955 based upon numbers activities is vacated, and the cause is remanded for a trial on that portion of the indictment that charges a violation of § 1955 based upon numbers activities. The balance of the judgment of the District Court is affirmed.

By the Court:

/s/ DANA H. GALLUP
Clerk.

Appendix B.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA
VS. CRIMINAL NO. 72-326-S

THOMAS SANABRIA

JUDGMENT OF ACQUITTAL
November 18, 1975

SKINNER, J.

On the 10th, 11th, 12th, 13th, 14th and 18th days of November, 1975 came the attorney for the government and the defendant Thomas Sanabria appeared in person and by counsel, Francis DiMento, Esq., and

The defendant having been set to the bar to be tried for the offense of unlawfully engaging in an illegal gambling business, in violation of Title 18, United States Code, Sections 1955 and 2, and the Court having allowed defendant's motion for judgment of acquittal at the close of government's evidence,

It is hereby ORDERED that the defendant Thomas Sanabria be, and he hereby is, acquitted of the affense charged, and it is further ORDERED that the defendant Thomas Sanabria is hereby discharged to go without day.

WALTER JAY SKINNER
U.S. District Judge

Appendix C.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

INDICTMENT

UNITED STATES OF AMERICA

v. CRIMINAL NO. 72-326-W

HARVEY T. PLOTKIN, RUTH LYNCH,
STEVEN J. EMERSON, BONNIE R. GLIXMAN,
JOSEPH GLIXMAN, DOMINIC L. SERINO,
JOSEPH W. WILKER, PHYLLIS FRANKLIN,
ARTHUR PLOTKIN, JOHN MOCCIA, JULIUS
SILVERMAN, JOHN J. CONSIDINE, JR.,
DAVID SHERMAN, THOMAS SANABRIA,
BERNARD HARRIGAN, JOHN WOLLEN

The grand jury charges:

From on or about June 1, 1971 and continuing thereafter up to and including November 13, 1971 at Revere Massachusetts within the District of Massachusetts,

HARVEY T. PLOTKIN, a/k/a "TEDDIE", of Revere
RUTH LYNCH, of Revere
STEVEN J. EMERSON, of East Boston
BONNIE R. GLIXMAN, of Revere
JOSEPH GLIXMAN, of Revere
DOMINIC L. SERINO, of Revere

JOSEPH W. WILKER, of Newton
PHYLLIS FRANKLIN, of Revere
ARTHUR PLOTKIN, of Revere
JOHN MOCCIA, a/k/a "JAKE", of Revere
JULIUS SILVERMAN, a/k/a "JULIE", of Malden
JOHN J. CONSIDINE, JR., a/k/a "JACKIE", of Revere
DAVID SHERMAN, a/k/a, "YARBO", of Swampscott
THOMAS SANABRIA, of Boston
BERNARD HARRIGAN, of Malden
JOHN WOLLEN, of Nashua, New Hampshire

did unlawfully, knowingly, and wilfully conduct, finance, manage, supervise, direct and own all and a part of an illegal gambling business, to wit, accepting, recording and registering bets and wagers on a parimutual number pool and on the result of a trial and contest of skill, speed, and endurance of beast, said illegal gambling business; (i) was a violation of the law of the Commonwealth of Massachusetts, to wit, M.G.L.A. Chapter 271, Section 17, in which place said gambling business was being conducted; (ii) involved five and more persons who conducted, financed, managed, supervised, directed and owned all and a part of said business; (iii) had been in substantially continuous operation for a period in excess of thirty days and had a gross revenue of two thousand dollars ($2,000) in any single day; all in violation of Title 18, United States Code, Section 1955 and 2.

APPENDIX.

In the Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 76-1040.

THOMAS SANABRIA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petition for a Writ of Certiorari Filed January 29, 1977.

Certiorari Granted June 27, 1977.

In the
Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 76-1040.

THOMAS SANABRIA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Table of Contents[1]

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[1] The indictment, the judgment of acquittal of the district court, and the opinion and judgment of the court of appeals are reproduced in the appendix to the petition for a writ of certiorari.

United States District Court
District of Massachusetts

CRIMINAL NO. 72-326-S.

UNITED STATES OF AMERICA

v.

THOMAS SANABRIA.

Relevant Docket Entries.

1972		
Sept. 12	Indictment returned.	
1975		
Nov. 18	SKINNER, J.	Criminal jury trial continues; Govt. rests; Defts.' requests for instructions filed; Hearing outside of jury on defts.' motion to strike testimony of Special Agent Raymond Ball, Motion DENIED; Deft. Silverman's Motion to strike Govt.'s exhibits #30-39 is DENIED; Deft. Silverman's motion to strike testimony of Special Agent James Kalstrom is DENIED; Motion of Joseph Glixman to strike is DENIED; Motions of each deft. for judgment of acquittal are Taken under Advisement; Deft., Silverman renews Motion to dismiss, Motion DENIED; Criminal jury trial resumes; Stipu-

1975		
Nov. 18		lation re: Testimony of Special agent Boyd (between Govt. and Silverman) filed; Deft. Julius Silverman rests; remaining defts. rest; jury excused; Motion of Deft. Sanabria for Judgment of acquittal is ALLOWED; Motions of all other defts. for Judgment of Acquittal are DENIED.
Nov. 18	SKINNER, J.	JUDGMENT OF ACQUITTAL RE DEFT SANABRIA, ENTERED. cc/cl
Nov. 19	SKINNER, J.	Appearance of Gerald E. McDowell for the Govt., filed. Govt.'s Motion for reconsideration of Court's ruling re: Deft., Sanabria filed; Govt.'s Motion to reconsider Court's ruling striking evidence of all illegal parimutual numbers pool filed; both motions for reconsideration are DENIED; Criminal Jury trial continues; Closing arguments by counsel; Luncheon recess; Charge; Alternate jurors discharged; Jury retires for deliberation at 2:27 P.M.; Jury returns at 4:45 P.M. with verdicts of Guilty as to all Defts.*; Verdict recorded and entered; Disposition on Dec. 10, 1975 at 2 P.M.
Dec. 18		Govt's Notice of Appeal re deft Sanabria filed.
Dec. 29		Designation of issue on Appeal filed re Sanabria filed.
Dec. 29		Designation of record on Appeal re Sanabria filed.

United States District Court
District of Massachusetts

CRIMINAL NO. 72-326-S.

[Title omitted in printing.]

Excerpts from Transcript of Sixth Day of Trial.

[2] THE COURT: Good morning, ladies and gentlemen. Good morning, counsel.

All right, the Government has rested, as I understand it. Is that true, Mr. Jigger?

MR. JIGGER: Your Honor, we only have one matter to be handled at the side bar.

(Conference at the bench as follows:

MR. JIGGER: Your Honor, when I indicated —

THE COURT: Wait until everybody gets here.

MR. JIGGER: Your Honor, on Friday I indicated we had no further witnesses. Now I would ask the Court to take judicial notice of the Massachusetts State Statute, a copy of which I provided, in Section 17 that is charged in the indictment. Also, at this time I have given counsel a copy of a further request for instructions the Government is filing in its case.

THE COURT: Do the Defendants intend to request instructions?

MR. DIMENTO: Yes, sir, I have some.

THE COURT: This is about the time to file them.

[3] MR. DIMENTO: All right.

THE COURT: Do you intend to go forward with testimony this morning?

MR. REDMOND: I thought first we would have some Motions to Strike, and then Motions for Judgment of Acquittal, and then put on my defense. Is that the order?

THE COURT: Yes. We better send the jury back up, then.

MR. REDMOND: Fine.

THE COURT: I'll take judicial notice of the statute. All right, we'll hear the motions and the Motions to Strike.

. . . . . .

[20] THE COURT: What other motions? Everybody has a Motion for Judgment of Acquittal?

MR. ALBERINO: Yes.

MR. GOLDBERG: Yes.

THE COURT: I don't think there is any question that there is sufficient evidence to go to the jury. Do you seriously want to argue that now?

MR. DIMENTO: I do, your Honor, yes.

THE COURT: Go ahead.

MR. DIMENTO: My Motion for Judgment of Acquittal on behalf of my clients, your Honor, is based principally on the failure of the Government [21] to prove that there was a violation of the State law as alleged in the indictment.

THE COURT: All right. In what respect?

MR. DIMENTO: The indictment states that these people were in a gambling business of registering bets on a number pool and on horse races. It says beasts, but we'll use the shortened expression, horse races, and that that was a violation of Section 17, which is in evidence. It was just put in evidence this morning.

THE COURT: Yes.

MR. DIMENTO: Your Honor has had long experience with our State law and especially — not especially, but including Section 17.

THE COURT: Not until I got here, as a matter of fact.

MR. DIMENTO: Really?

THE COURT: Yes.

MR. DIMENTO: Well, the case of Commonwealth versus Chagnon is very well known under Section 17. That is C-h-a-g-n-o-n, reported at 330 Massachusetts Reports, Page 278.

At page 282 the Court says that registering bets as such is not made a crime by Section 17. The allegation in that case was that the Defendants had [22] conspired together to commit the crime of registering bets. You have much of that here, that the Defendants here engaged in the illegal gambling business of registering bets in violation of 17. In other words, the allegations are parallel, and the Supreme Judicial Court of Massachusetts, which is the last authority for construing our Massachusetts laws, states quite clearly that registering bets as such is not a crime, so that the Defendants have not been proved in this case to have violated Massachusetts law Chapter 271, Section 17, as alleged.

Now, furthermore, your Honor —

THE COURT: Excuse me, Miss Cleeman, get me 330 Mass., please.

MR. DIMENTO: Furthermore, this indictment charges that the Defendant engaged in the illegal business of accepting bets on a parimutual number pool in violation of 17, and I think your Honor's experience with Massachusetts law will tell him that there is no violation of Section 17 in engaging in the number pool business, because Section 17 is designed to reach apparatus which is designed for use in races, horse races, sports betting, games, and so forth. It is

not designed to reach a pool which is not based on a game of competition. [23] Your Honor knows that this is not the statute that is used to prosecute number pool violators.

I believe the statute that is used for that is Section 7. At any rate, it is not this statute. This statute is very narrowly drawn, making it a crime to be in the presence of gambling apparatus, which is used for wagers in connection with contests, games, competitions, whether man or beast. So that I take the position, your Honor, and I submit very strongly that they have not proved what they have alleged and specified in the indictment.

THE COURT: All right.

MR. DIMENTO: The top of Page 282, your Honor, the first full sentence, about registering bets?

THE COURT: Yes.

MR. DIMENTO: The indictment is set out in the footnote at the bottom of Page 278.

THE COURT: I think there is a difference, when you start with 1955, but I'm going to explore that in just a minute. Are there any other grounds for judgments of acquittal?

• • • • • • • • •

[37] THE COURT: I'm going to take a short recess to consider the application of this statute to this situation.

[Recess.]

THE COURT: Well, I've come to the following conclusions on the general principle asserted by Mr. DiMento in his first motion. I am persuaded that under the Federal statute, it is not necessary that each defendant could be convicted under the State statute. It's necessary that the conduct prohibited by the State statute be found by the jury to have existed and that a defendant to be convicted must be found

to have joined in that enterprise in some way, to aid it, being somebody other than a bettor. For that proposition I rely on [38] just one of many cases that deal with this point, United States versus Berger at 461 F. 2d 230, which was in the Court of Appeals for the Second Circuit.

On the point of what constitutes $2,000 of bets, the cases, as I read them, do not go to the point of actual cash receipts for the day, but in terms of wagers taken, and the question about the parlay is an interesting one, but it perhaps raises a more refined issue than Congress contemplated, and I think is properly included under the wagers handled in the course of the day, which is what the case talked about. Of course, the difference between the wagers and the cash receipts, because the wagers are made over the phone and I take it the settlement may be some other time, obviously, can't be contemporaneous with the wager.

So on all these various bases that were argued, I'm denying all of the Motions for Judgment of Acquittal.

MR. DIMENTO: Excuse me, your Honor. Is the numbers still in the case?

THE COURT: Excuse me?

MR. DIMENTO: I was asking, is the numbers pool allegation still in the case?

THE COURT: Yes. I think that's included.

[39] MR. DIMENTO: Under 17?

THE COURT: Under 17. That's a game, considered by people a game, to see what number will turn up. Yes, I think that's a game.

Do you have any case that says it's not included?

MR. DIMENTO: Never in the history of Massachusetts has the number pool been prosecuted under this.

THE COURT: That is not conclusive. Maybe they'll start after this case.

MR. DIMENTO: That is too bad.

THE COURT: I don't think it's conclusive. If you don't have a case that says it's excluded, I would rule it was included. State authorities may have a tighter statute that they would feel happier with, but I think it's included within the game.

MR. DIMENTO: The result, you're saying the number depends on the result of a game?

THE COURT: No, I think the business of relying on a number is itself a game. See what number turns up.

MR. DIMENTO: I see what you're saying.

[40] THE COURT: A game of chance, as they say.

MR. DIMENTO: The point I was making, your Honor, is that the game that they intend as a game in the ordinary way we think of it —

THE COURT: Like a football game.

MR. DIMENTO: — the number depends on the amount bet. It doesn't depend upon the results of any game.

THE COURT: No, but it is itself a game.

MR. DIMENTO: Well, I think that is a novel interpretation of the Massachusetts law.

THE COURT: In any case, I don't know whether it makes all that difference, because we have evidence as to horse bets.

MR. DIMENTO: It cuts the evidence in half or more, your Honor.

THE COURT: Well, I'm going to let it stand. I'll let it stand. There adds to it a very large number of interesting questions in this case, but I'm going to let it stand. I think it's included, at least for the purposes of 1955.

We have the indictment around here somewhere. I think it's a closed question.

MR. DIMENTO: See, under the Massachusetts law number pool is considered to be a lottery, your Honor.

[41] THE COURT: Yes.

MR. DIMENTO: I was relying more on your experience I thought you might have had in the local District Attorney's Office, since I didn't realize you spent all the time in the heavens.

THE COURT: That was in Plymouth County.

MR. DIMENTO: No bookies.

MR. REDMOND: None that were arrested.

THE COURT: It's a lottery, isn't it?

MR. DIMENTO: It's a lottery.

THE COURT: And a lottery is a game. It's a game of chance.

MR. DIMENTO: Well, no, not exactly, your Honor. This statute is not selling pools upon a lottery. This statute states it's a crime to sell pools upon a game. You are not selling pools upon the game, you're selling pools upon a number that comes out by parimutuel, under the parimutuel system. The game is the horse race. That is only indirectly involved. But the inure of the horse race doesn't determine the number.

THE COURT: No, I understand that. That would be the contest of speed of beast.

MR. DIMENTO: Right, or upon the result of a game. That is not a game, because it is not a [42] contest. A game requires some kind of skill or play between people.

THE COURT: No, a lottery via game, isn't it? Isn't that what our Government calls it when you buy those little green things down at the — that's called The Game, isn't it?

MR. DIMENTO: But it really isn't a game under our Massachusetts statute. It's not thought to be a game any more than dice is a game.

THE COURT: I always thought that was a game. For some people it's a business, I know, but I always thought of it as a game.

MR. DIMENTO: The Game, or a game under Massachusetts law requires some kind of skill. It's a contest whether it be mental or physical.

THE COURT: Some people who are bettors are said to be in the activity of gaming.

MR. DIMENTO: Those are generic terms, but now we are getting down to the bare bones of our Massachusetts law, our statutes here, and the number pool is considered a lottery, sports.

THE COURT: You say that the term "game," as it appears in Section 17, is not used in its generic sense but in a specific, particularized sense of a football game or hockey game?

[43] MR. DIMENTO: Yes, exactly. This game that we're talking about is a result of the amount of money bet by people.

THE COURT: Do you have any case that says so?

MR. DIMENTO: As I said, your Honor, they never prosecute under this statute. It's just never been done. Every Massachusetts lawyer just understands that that's sports, and horses, and dogs, and the lottery is the number pool.

THE COURT: Whole crowds of lawyers get shocked all the time. I can't go by that.

Think of what the Supreme Court does to us every session in terms of causing us to review our concepts.

Mr. Jigger, do you have anything to add on that?

MR. JIGGER: Your Honor, I would just point out that the statute speaks in terms of whoever keeps a room or is found present and enumerates the other factors. The crime, from my limited knowledge of Mass. State law, is being found either present or maintained in a room.

THE COURT: "For registering bets, or buying or selling pools, upon the result of a trial [44] or contest of skill,

speed or endurance of man, beast, bird or machine, or upon the result of a game, competition, political nomination, appointment or election," and then it goes on to say or whoever is present is to be punished the same way.

The point is, having been found somewhere, what other kind of apparatus is it? And if Mr. DiMento is right, we would have to exclude from the evidence in the case all of the evidence that has to do with bets or numbers.

MR. JIGGER: Your Honor, the Government would submit that that does not necessarily follow.

THE COURT: Why not?

MR. JIGGER: Because the Defendants have been charged with operating a gambling business, which is in violation of State law. Now, there's no question that the horse race aspect of it is in violation of State law. There are other aspects to the bets as well, but the violation of State law is merely a jurisdictional element which must be satisfied prior to the initiation of Federal prosecution.

THE COURT: Right.

MR. DIMENTO: This is not my Motion for Acquittal, this is simply on the motion, perhaps, to strike or limit the evidence. It will have [45] relevance for the requests for instructions, I guess, my request 29.

THE COURT: This points to the jurisdictional thing. You're saying that if the — yes, but you have to prove the kind of illegal gambling business which you have charged, just the same even though it's jurisdictional, and you've charged the gambling business which is in violation of Section 17.

MR. JIGGER: Your Honor, you know, to run to the basic point here —

THE COURT: This whole subject is referred to as gaming. I mean, that is the generic term for this entire kind of an operation. I'm going to deny the motions.

Let's go forward.

MR. REDMOND: Your Honor, could I —

THE COURT: It's an interesting point, but I'm going to deny the motions.

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[73] MR. DIMENTO: Well —

THE COURT: Do you want to use it, Mr. Jigger?

MR. JIGGER: Yes, I intend to use it.

MR. REDMOND: He wants to use it now, your Honor.

MR. JIGGER: No, your Honor, I intended to use if before, as I intend to use the other chart.

THE COURT: I think he's entitled to use the chalk in his argument.

MR. REDMOND: May we adopt all of the Defendants' requests for instructions and may your rulings be applicable as to all of us?

THE COURT: Do you mind that, Mr. DiMento?

MR. DIMENTO: No, but I think another important piece of housekeeping is we should renew, now that all the evidence is closed, our respective motions for judgment of acquittal.

THE COURT: All right. They are considered renewed and denied.

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[75] [the following is outside the presence of the jury.]

THE COURT: I am going to reverse a ruling that I have made. You better sit down and get braced for that.

In waffling around with the citations under 271 17, I came across a case called Commonwealth versus Boyle, 346

Mass. 1, in which Boyle was indicted under both 7 and 17, and there were booking slips identified as such by experts.

The question was whether that was sufficient identification of these documents as booking slips, and in the course of the discussion on Page 4, the Court said, "The position of any recorded memorandum intended to be a [76] minute of a bet is sufficient to demonstrate a violation of either GL Chapter 271 Section 7 or Section 17 or both of these sections depending upon the contents of the memorandum." From which I am led to the conclusion that Mr. DiMento was right in his argument and that at least it has been considered by the Supreme Judicial Court, Section 17 does not include the numbers aspect, so that while I am not going to grant a Motion for Judgment of Acquittal on that basis, I will grant the Motion to Strike so much of the evidence in the case as has to do with numbers betting.

Now, I don't think with respect to the physical evidence we have had that we distinguished, and I'm not sure that it can be done, but I'm going to instruct the jury to disregard it without trying to at this point sort out the exhibits, unless you feel you can do that.

MR. DIMENTO: Well, I think we could use another recess, your Honor, to reorganize ourselves. Surely, our argument has to be reorganized.

THE COURT: Yes, I'm afraid they do. Now I don't know whether the Government can sort these out. Is Mr. Cross still around?

MR. BOUDREAU: No, your Honor, he's not.

THE COURT: I don't think there is any question about it. I think this Boyle case, unless it's been subsequently overruled and I doubt that it has, because [77] it's fairly recent as Massachusetts cases go.

MR. REDMOND: If that's so, your Honor, then will your Honor instruct the jury, will he entertain, excuse me,

motions to strike any conversations? I presume you will, your Honor, on the tapes, having to do with number play? That would seem to be the logical extension, your Honor, of that ruling.

THE COURT: Yes, I think that's right.

MR. REDMOND: Then we do need some time, your Honor. Bear in mind, I wrote the numbers 3150 on the board, 35 taken from it, tapes, two conversations were put in against my fellow.

THE COURT: None of which had to do with numbers. It had to do with that parlay and Mr. Lusk.

MR. REDMOND: That was one phone conversation, your Honor.

THE COURT: Yes.

MR. REDMOND: But there was another one that was between, supposedly between, Arthur and Teddy, if I remember correctly.

THE COURT: That still had to do with Lusk. I'm pretty sure they're both on the same day, Considine and Arthur Plotkin. Let's see, Considine and Harvey Plotkin, yes, then there's a previous one, Harvey Plotkin, and Arthur Plotkin, you're right.

[78] MR. REDMOND: That is the one I am talking about, your Honor.

THE COURT: That had to do with numbers.

MR. REDMOND: I want that stricken, your Honor.

THE COURT: All right, it's stricken.

MR. JIGGER: Your Honor, the Government at this point would argue that all of this evidence is evidence of similar acts which would be admissible in the case consistent with your Honor's earlier ruling. The Government would also, for purposes of the record, indicate perhaps I'm a little unclear, but the registering bets or playing or selling pools

here would also encompass the conception of a numbers operation based upon —

THE COURT: Registering bets or playing pools upon the result of all of these things, you have to follow the grammatical construction. But in any case, this Boyle case seems to dispose of it.

MR. JIGGER: It would be just our suggestion to the Court that Agent Cross —

THE COURT: You leave this stuff in with an instruction that they are not to consider it as an independent item, is that what your thought is?

MR. JIGGER: Yes, your Honor.

MR. GOLDBERG: Your Honor, in keeping —

[79] THE COURT: I think in the case of Arthur Plotkin that would be given the very small amount of evidence on any other point, that would be highly prejudicial. I'm going to strike that conversation.

MR. GOLDBERG: May I call the Court's attention to the conversation which involved Mr. Silverman on June 5, 1971?

THE COURT: What number is that? Do you have these things numbered?

MR. GOLDBERG: Mine are not numbered, your Honor.

THE COURT: Julius Silverman is only on two of them. The one with Considine?

MR. GOLDBERG: The one with Jackie, and they talk about a bet, someone named Larry DeLounge.

THE COURT: Yes, what about it?

MR. GOLDBERG: I assume this is the type of conversation, also, that ought to be stricken.

THE COURT: Well, I don't recall it. What do you say it is? Do you say it's a numbers bet? You've got transcripts of the thing, I don't.

MR. GOLDBERG: I have it here, your Honor.

THE COURT: All right, let's take a look.

MR. REDMOND: That is either number 16 or 17 my notes reflect, your Honor.

[80] THE COURT: Now, what did we say, there was some discussion of what a bleeder was?

MR. REDMOND: That is a numbers bet, your Honor, I believe.

THE COURT: Yes. Two digits of the number is the bleeder, and he had a two dollar bleeder. This is where the guy gets to make a sawbuck.

MR. GOLDBERG: That's right.

THE COURT: The writer or somebody gets to make a sawbuck. I'm going to strike that, too.

What about Julius' next call, Jackie and Julius, New York for two, seventh race, the one at Suffolk. Okay he's in the horse business there.

MR. DIMENTO: We could make it a serious question with Sanabria, now, because he's only in the numbers conversation. He's probably entitled to a judgment of acquittal. There is nothing to give to the jury on him.

THE COURT: Which one is he?

MR. DIMENTO: He has to go to work this afternoon, too.

THE COURT: I'm not going to base a discussion on that.

MR. DIMENTO: He did want to get out early. He's on number eleven.

[81] THE COURT: Number eleven, Bonnie Glixman and Thomas Sanabria. All right, do we have that transcript?

MR. DIMENTO: Yes.

THE COURT: Let me take a look. That's it. Is that the only call we have with Sanabria?

MR. DIMENTO: We have somebody, it's not Sanabria, an unknown female, giving in some numbers charging them to Tommy, and that's it, all number thirteen. I don't know if that is properly charged to him at all.

THE COURT: It's charged under TS.

MR. DIMENTO: That is numbers, anyway.

THE COURT: Well, that may be something, there.

MR. ALBERINO: If your Honor please, with regards to Dominic Serino, there are some conversations here that I think ought to be considered also, twenty through twenty-five.

THE COURT: There is a whole mess of them. Let me take a look at those.

MR. JIGGER: Your Honor, at this point I think the Government would like to indicate again for the record our contention that the violation of the state law is a jurisdictional element which has to be established for the business as a whole.

THE COURT: Yes, but it has to be established in the terms that you charged it, which was as a [82] violation of Section 17. You're stuck with your indictments. I think if you charged a double, as a present case coming up as both 7 and 17, this one, Santarpio, that I'm working on this afternoon, but you didn't, you said 17 and you're stuck with it. It must be proved as charged.

MR. JIGGER: Well, your Honor, the Government would just indicate the dichotomy in this case, in this situation.

THE COURT: It doesn't appear whether this is numbers or not. They're just complaining. First at Suffolk, fourth at New York, second at Jersey.

MR. ALBERINO: Then they switch over to the numbers.

THE COURT: Well, since there is horse betting in the conversation, we're going to leave them in.

MR. ALBERINO: There is some in there that should be stricken, your Honor.

THE COURT: Which one is stricken? The top three Jersey, dollar combination, 409, 902, all right. That sounds like strictly numbers. That is number 23?

MR. ALBERINO: Yes, your Honor.

THE COURT: Number 23 is sports and numbers. The first one on numbers is 20. 21 stays in. 22 stays [83] in. 23 and 24 are out.

MR. JIGGER: Your Honor, is the Government to understand that you've departed from your earlier reasoning on the sports wagers and are now removing all the evidence that has any indication of numbers bets despite —

THE COURT: No, but there is one conversation that has nothing in it but numbers and sports, so I'm knocking it out.

MR. JIGGER: Well, your Honor, the Government would draw your attention to the ruling earlier on the sports bets, and —

THE COURT: I recall it. I recall that, and I had it in mind. I'm not striking all the sports bets, but here there is a particular conversation that has no probative value in the case. You've got other conversations.

Now, I don't like to be in a position of reversing myself any more than you like to have me do it, but the cases are there.

MR. DIMENTO: Your Honor, numbers 18 and 19, which refer to Moccia, are only numbers.

THE COURT: All right.

MR. DIMENTO: And he may be in the position of Sanabria, entitled to a judgment of acquittal of [84] there being no evidence against him except numbers talk.

THE COURT: I'm going to come to that. Do you have the Moccia transcripts?

MR. DIMENTO: Yes, right here, 18 and 19.

THE COURT: 18, but 19 is horses.

MR. DIMENTO: Excuse me?

THE COURT: This is horses.

MR. DIMENTO: It doesn't leave very much on the case.

THE COURT: No, it doesn't, but it does leave something. The numbers, 18 is out.

All right, do you have any evidence against Sanabria, Mr. Jigger, other than the telephone call involving numbers?

MR. JIGGER: Your Honor, one of the telephone calls —

THE COURT: Received by somebody who identified himself as Sanabria.

MR. JIGGER: Yes, that's correct, your Honor. Not only that, I would draw your Honor's attention to the telephone call in which an unidentified female called in and requested that certain numbers be charged to the account of Thomas Sanabria.

THE COURT: No, she did not. It was Tommy.

[85] MR. JIGGER: Then it was responded Sanabria, Tommy or Frank.

THE COURT: I don't recall that. Do you have it there?

MR. DIMENTO: In any event, it's still numbers.

MR. JIGGER: Your Honor, the point is, though, the call indicates his code is TS, and I believe in the physical evidence there are horse bets with TS on them, although I will have to check on that, your Honor.

THE COURT: Well, where does it appear that his code is TS?

MR. JIGGER: "Charge them to TS. Okay, that's Tommy."

THE COURT: "Have any numbers? Yeah." "Who's this?" Unidentified female response: "Sanabria."

Jackie then responds: "Who should I charge them to?" Then he says, "Tommy, charge them to TS. That's Tommy, okay."

You haven't based your charge on Sanabria on anything that he did, only on what somebody else is saying, and in order to do that you have to make a preliminary showing

that Sanabria was connected with this operation, and by that I mean a horse operation. I [86] don't think you've done it. The Motion for a Judgment of Acquittal as to Sanabria is allowed.

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[88] THE COURT: Your position on the law, gentlemen, must have been known to you before today, and, in fact, nobody even cited the Boyle case to me. I happened to come across it more or less by accident. I'm sure the Government wishes that I had gone out there and simply drank a cup of coffee or something. I came across it, and the issue had not been raised [89] until this time.

• • • • • • • • •

[90] THE COURT: Well, I think everybody is going to have to — I think this ruling that I've just made comes as not only a surprise to me, it comes also as a surprise to all of the attorneys in the case, and I think not only the defense, but probably the Government will want some time to regroup and consider what their arguments are and what is left of the case. It's a shame this matter came to light so late in the case, because we clearly have put a lot of time and energy and caused a lot of evidence to be introduced, which as I now believe, are not within the scope of the indictment, of the description of the illegal gambling business that is charged in the indictment. So we're going to have to go over this. I'm inclined to think perhaps we should put the whole case over until tomorrow morning for arguments and charge.

• • • • • • • • •

[93] THE COURT: I bet you do pretty well. This case is continued until nine o'clock tomorrow morning.

Counsel, I'm going to ask the jury to come down. I think they are entitled to a brief explanation of what is going on, rather than tell them to go home and come back tomorrow.

[Whereupon the jury entered the courtroom]

THE COURT: Ladies and gentlemen, this case has suddenly taken a turn, that is, there has been a change in it resulting from a ruling of mine, which had to do with the nature of the business which is charged as being in violation of the laws of the Commonwealth in the indictment. The indictment refers to Massachusetts General Laws Chapter 271, Section 17. That is the only section referred to.

It has been the theory of the case up to this point that that section prohibited a gambling business that included numbers, as well as horses and dogs, and other kinds of contests. As a result of some [94] research that I did in response to arguments presented this morning, I have come to the conclusion that that is not so, that the section charged does not include the numbers or lottery aspect, and that that is charged under another section of the Massachussetts laws.

Therefore, I have made an order to strike so much of the testimony as has to do with numbers bets, and that ruling requires some specific orders as we review the exhibits, and the phone calls, and so on that you've heard. Now, of course, this changes the case quite a lot and requires counsel to go through the records and identify those things which are still admissible under the ruling that I've made, and those things which are not admissible and must be stricken. So they're going to spend the afternoon on that.

I said I had hoped to complete this case today, but I don't think it's possible, because this changes the character of the case. This requires some additional effort on everybody's part. I'm going to suspend with this case now and resume tomorrow morning at nine o'clock, at which time all that will be left in the case will be arguments and the charge. I will instruct you specifically at that [95] time as to the evidence which has been stricken from the case. We will see you then.

. . . . . .

United States District Court
District of Massachusetts

CRIMINAL NO. 72-326-S.

[Title omitted in printing.]

Government's Motion to Reconsider.

The United States of America by and through its attorneys hereby moves that the Court reconsider its ruling of November 18, 1975, striking from the instant case evidence concerning the operation of an illegal parimutuel numbers pool by the defendants herein, reverse said ruling, and allow the Government to amend the indictment, and in support thereof states as follows, to wit;

The indictment charges that, between June 1, 1971, and November 13, 1971, the defendants did "conduct, finance, manage, supervise, direct and own all or part of an illegal gambling business, to wit, accepting, recording and registering bets and wagers on a parimutuel number pool and on the result of a trial and contest of skill, speed, endurance of beasts, said illegal gambling business; (i) was a violation of the laws of the Commonwealth of Massachusetts, to wit, M.G.L.A. Chapter 271, Section 17, in which state said gambling business was being conducted; (ii) involved five and more persons who conducted, financed, managed, supervised, directed and owned all and a part of said business; (iii) had been in substantially continuous operation for a period in excess of thirty days and had a gross revenue of two thousand dollars ($2,000) in a single day, all in violation of Title 18, United States Code, Sections 1955 and 2."

The Court granted defendants motion to strike the evidence relating to the operation of an illegal parimutuel numbers pool on the grounds that Section 17 of Chapter 271 of the laws of the Commonwealth of Massachusetts, which is the specific section of the Massachusetts law set forth in the indictment does not encompass this form of illegal gaming.

The Government requests leave of the Court to reopen its case and amend the indictment by adding Section 7 of the M.G.L.A. following the reference to Section 17 of said statute.

Both Rule 7(c) of the Federal Rules of Criminal Procedure and the relevant case law demonstrate that miscitation of a statute in the indictment is a technical error subject to correction by amendment of the indictment since it is an error of form not substance.

Rule 7(c) of the Federal Rules of Criminal Procedure requires that an indictment "shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged".

The fundamental requirement of an indictment is to furnish the accused with such a description of the charge as will enable him (1) to prepare his defense, (2) to protect him against double jeopardy, and (3) to inform the court of the facts alleged so that it may decide if they are sufficient in law to support a conviction. *Russell* v. *United States*, 369 U.S. 749, 82 S. Ct. 1038, 8 L.Ed.2d 240 (1962); *Hagner* v. *United States*, 285 U.S. 427, 52 S. Ct. 417, 76 L.Ed. 861 (1932); *United States* v. *Addonizio*, 451 F.2d 49 (3rd Cir. 1972); *Anderson* v. *United States*, 262 F.2d 764 (8th Cir. 1959); *United States* v. *Lamont*, 236 F. 2d 312 (2nd Cir. 1956).

It is fundamental, of course, "that an indictment may not be amended except by resubmission to the grand jury unless

the change is merely a matter of form." *Russell* v. *United States*, 364 U.S. 749, 770 (1962). The indictment can, however, be changed or amended in a number of "formal" ways so long as the defendant is not subject to conviction for a different crime than that charged by the grand jury. Pursuant to Rule 7 (d), F.R. Cr. P., a Court, upon motion of the defendant may strike prejudicial surplusage from an indictment. The Court may also withdraw particular counts of an indictment from the consideration of the jury, upon motion of the prosecutor or defendant, pursuant to Rules 14, 29, and 48 (a), F.R. Crim. P. These actions technically amend or alter the original indictment returned by the grand jury, but are expressly permitted by the rules, and do not deprive the Court of jurisdiction to proceed.

The "settled rule" of *Russell*, *supra*, allowing amendments of form, is most commonly applicable when the indictment contains either a statutory miscitation or a typographical error as to a date. Indeed, Rule 7 (c), F.R. Crim. P., provides inter alia, "Error in the citation or its omission shall not be grounds for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice." Rule 7 (c) is applicable to statutory miscitation whether the miscitation appears on the margin, caption or body of the indictment. In *Davis* v. *United States*, 279 F.2d 576 (4th Cir. 1960) an indictment for conspiracy to traffic in heroin charged that the offenses contemplated by the conspiracy were in violation of the Harrison Act and Acts amendatory thereof. Technically the Harrison Act had been repealed rather than amended, and similar laws were enacted to replace it. This misreference to the Harrison Act occurred in the "body" of the indictment rather than in the violations section. It was argued to the Fourth Circuit that the indictment was invalid as on it did not allege a

conspiracy to violate current federal law. The Court rejected this hypertechnicality, holding that the indictment clearly charged a conspiracy to traffic in heroin which was, in fact, a violation of federal law.

> "In keeping with the spirit, at least, of Rule 7 (c) of the Federal Rules of Criminal Procedure, 18 U.S.C., it was appropriate to cite the statute which makes unlawful the conduct in which it is charged, the conspirators planned to engage. The rule expressly provides, however, that error in the citation, or its entire omission does not vitiate the indictment unless the error or omission had misled the defendant to his prejudice. There was no showing here that the defendant or his counsel, was in any way misled, much less prejudiced, by the reference to the Harrison Act rather than to the appropriate sections of the current code . . ." 279 F. 2d at 578

In *Stewart* v. *United States*, 395 F.2d 484 (8th Cir. 1968) the indictment charged the defendant under the Dyer Act with theft of an airplane "on or about July 21, 1967." The actual date of the crime was June 21, 1967, and the trial judge amended the indictment to correct the clerical error. The Eighth Circuit held that the date was not an essential element of the crime, and since the rest of the indictment sufficiently informed the defendant of the elements of the offense, the amendment was proper.

> "By reason of our constitutional provisions, an indictment cannot be amended in a substantial material

> way so as to broaden or change the charge or to prejudice an accused by failing to fully apprise him of the charge against him, but it would be wholly impractical and not required by any rule of law to vitiate this indictment by reason of the correction of a clerical error that was not of the essence in connection with the charge of the commission of the crime." 395 F.2d at 488.

In *Williams* v. *United States*, 179 F. 2d 656 (5th Cir. 1950) aff'd, 341 U.S. 97, the indictment charged the defendant with bringing a victim "into a certain building sometimes called a shack on the premises of the Lindsley Lumber Co." and acting under color of law assaulting the victim. At the close of the Government's case the court amended the indictment striking "Lindsley Lumber Co., a corporation" and inserting "Dania Supply Co., a corporation, doing business as Lindsley Lumber Co". The Fifth Circuit upheld this amendment on appeal, since the gist of the offense charged was whether the defendant violated the victims' rights under color of law. The identity of the Corporation, whose theft the defendant was investigating, "is not a matter of substance and the amendment . . . was without the slightest prejudice to the appellant." 179 F.2d at 659-660.

In *United States* v. *Mills*, 366 F.2d 512 (6th Cir. 1966) an indictment charging a conspiracy to violate the Mann Act alleged as an overt act that the defendant telegraphed money to one "Ted Mason". The trial judge in his charge to the jury orally amended the then obvious mistake in the recipient's name to read "Ted Jackson." The Court of Appeals affirmed the conviction treating the amendment as

a non-material variance which did not mislead or prejudice the defendant, or affect his substantial rights. Cf. *Dye* v. *Sacks*, 279 F.2d 834 (6th Cir. 1960), cert. denied, 358 U.S. 45. In view of this authority a statutory miscitation is clearly a matter of form, and error in the citation does not affect the substantive facts alleged in the indictment. It is well settled that if the indictment charges acts illegal under an existing federal statute, it is not invalidated for failure to refer to the statute or for specifying the wrong statute." *Pettway* v. *United States*, 416 F.2d 106, 108 (6th Cir. 1954), cert. denied 355 U.S. 918.

In *United States* v. *Fruchtman*, 421 F.2d 1019 (6th Cir. 1970) defendant was charged with interference of an investigation by the Federal Trade Commission in violation of 18 U.S.C. §1503. The indictment alleged that the agency investigation which was obstructed was being carried out pursuant to 15 U.S.C. §13a. At the conclusion of the opening statement by the Government, defendant called to the attention of the trial judge the fact that the indictment contained a miscitation of a federal statute. Following argument on what it treated as defendant's motion to dismiss, the trial Court allowed the Government to amend the indictment to charge violation of 15 U.S.C. §13(a) an entirely different statute from 15 U.S.C. §13a. On appeal from conviction by a jury, defendant contended the Government had impermissibly amended the indictment. In affirming the conviction, the Court of Appeals held at p. 1021 "The original indictment fairly stated the *facts* upon which the charges were based, but in describing the investigation conducted by Smeraldi it was erroneously stated that he was proceeding upon Section 13a instead of 13(a) of Title 15, United States Code, Appellant has not demonstrated that he was misled or prejudiced by reason of

the amendment. The amendment was a nonprejudicial change of form and was properly permitted to be made." (citations omitted) (emphasis added)

The instant indictment adequately set forth the elements of the federal offense proscribed, the conducting of an illegal gambling business in violation of 18 U.S.C. §1955, and provided sufficient notice of the government's charges. See e.g., *United States* v. *Marrifield*, 515 F.2d 887, 883 (5th Cir. 1975), where the Court ruled that an accusation that the defendants "did knowingly and willfully conduct . . . an illegal gambling business to wit, a business for placing bets on dice and cards" constitued an adequate notice of a violation of state law. *United States* v. *Marrifield*, 496 F.2d 1278, 1282 (5th Cir. 1974). Cf., *United States* v. *Kenny*, 462 F.2d 1205, 1213-1215 (3rd Cir. 1972), *cert. denied* 409 U.S. 714 (1972). Here, the indictment alleged that the defendants conducted an illegal gambling business which accepted bets on a parimutuel numbers pool, that it involved five and more persons, that it was in operation for thirty days and that it had a gross revenue in excess of $2,000 in a single day.

Even if the sections of the state statute cited in the indictment should have been both M.G.L.A., Chapter 271, Section 7, and Section 17, the omission of reference to a specific section of the statute relating to operation of an illegal numbers pool is not grounds for striking evidence of such nature since the error did not mislead the defendant in his prejudice. *United States* v. *Van West*, 455 F.2d 958 (1st Cir. 1972); *United States* v. *Rosenson*, 291 F. Supp. 867, 870 (E.D. La. 1968), aff'd, 417 F.2d 629 (5th Cir. 1969), See also *United States* v. *Calabro*, 467 F.2d 973, 981 (2nd Cir. 1972), *cert. denied*, 410 U.S. 926 (1973). The proper remedy is to allow the Government to correct

the technical error in the indictment. See *Van West, supra.* See also *United States* v. *Fruchtman,* 421 F.2d 1019 (6th Cir. 1970), *cert. denied,* 400 U.S. 849; *United States* v. *Clark,* 416 F.2d 63 (9th Cir. 1969).

The question is whether the amendment to an indictment which charged crime "X" so changes the indictment that it now charges crime "Y" thus depriving the defendant of a substantial right. The amendment requested by the Government in this case performs no such function. The instant indictment informed the defendants of the charges against them with enough specificity to enable them to prepare any defenses they might have had to the allegation that they operated an illegal gambling business in violation of state law which was in violation of 18 U.S.C. §1955 and 2.

In addition the defendants, if convicted, could plead their conviction in bar to any further prosecution of operating the illegal gambling business charged herein.

> "Non-prejudicial errors and defects do not invalidate indictments which otherwise fulfill the two prime requisites of informing the accused of the nature of the charge and defining the scope of a future plea of double jeopardy . . . the essence of this principle is found in Rule 52(a) of the Federal Rules of Criminal Procedure which states that 'any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.'" *United States* v. *Levinson,* F.2d (6th Cir. 1968)

WHEREFORE, the Government prays that the Court reconsider and reverse its ruling allowing the motion to

strike the evidence pertaining to the illegal parimutuel numbers pool and then allow the Government to amend the indictment to include specific reference to Section 7 of Chapter 271, M.G.L.A.

Respectfully submitted,
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United States District Court
District of Massachusetts

CRIMINAL NO. 72-326-S.

[Title omitted in printing.]

Government's Motion that this Court Reconsider its Granting of Defendant Sanabria's Motion for Judgement of Acquittal, and for Other Appropriate Relief.

The United States respectfully moves this Honorable Court to reconsider its decision granting defendant Thomas Sanabria's motion for judgement of acquittal, to deny said motion and to order that Sanabria continue as a defendant in the trial of this case.

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RECONSIDERATION.

On November 18, 1975 this Court granted the motion of Thomas Sanabria to grant him a judgement of acquittal. Sanabria's motion was made and granted after the jury had been sworn, evidence had been presented and both sides had rested. Ordinarily prosecution terminates upon a judgement of acquittal *Fong Foo* v. *United States*, 369 U.S. 141 (1962). The granting of Sanabria's motion for judgement of acquittal arose out of extraordinary circumstances, however. The Government contends that nothing in the Fifth Amendment's double jeopardy clause or the laws of the United States prohibits this Court from returning both the United States and Sanabria to the status quo ante his

"acquittal" and permitting this prosecution to proceed to a verdict by the jury.

At the close of presentation of evidence in this case this Court reversed its prior ruling and granted Sanabria's motion to strike evidence relating to a parimutual numbers pool alleged to be conducted by the defendants. The reason for this action was this Court's determination that the indictment failed to allege that the parimutuel numbers pool was in violation of the laws of the Commonwealth of Massachusetts because of the indictment's reference to M.G.L.A. Chapter 271, Section 17, which statute this Court held not to apply to betting or numbers. On the basis of these rulings Sanabria moved for a judgement of acquittal. This Court granted the motion after finding that the only evidence against Sanabria related to an illegal numbers business and this Court had determined that the indictment was fatally defective in that it failed to charge an illegal numbers business in violation of Massachusetts law.

In the less than 24 hours that have passed since this Court made the rulings in question the jury remains empanelled to try what is left of the case, and nothing further has transpired in front of the jury in Sanabria's absence.

The Government contends that this Court was in error in making the above described rulings. In support of this contention the Government incorporates by reference its companion Motion to Reconsider the Striking of Evidence concerning the Operation of an Illegal Parimutuel Numbers Pool. The thrust of this memorandum is to establish that this Court can properly reverse its judgement of acquittal for Sanabria.

There is no question that jeopardy has attached in this case. This conclusion begins, not ends, the inquiry into whether Sanabria can be made to continue in this trial or

whether the double jeopardy clause bars any further trial of the facts of this case. *Illinois* v. *Somerville*, 410 U.S. 458, 467 (1973). The Supreme Court has only last term indicated that questions of double jeopardy cannot be settled by talismatic use of the concept of acquittal. *Serfass* v. *United States*, 95 S. Ct. 1055, 1064 (1975).

Basically this Court has ordered a judgement of acquittal for Sanbria because it felt that the indictment failed to state an offense involving numbers gambling. While this Court has entitled its action a judgement of acquittal such a characterization of its ruling cannot control the classification of the action for purposes of appellate review. *United States* v. *Jorn*, 400 U.S. 470, 478 n. 7 (1971). This principle should also apply when the trial Court reconsiders its own actions.

In this case the jury who is the primary factfinder has made no determination of guilt or innocence on the merits. The Court has made a ruling which is purely legal — that the indictment does not state an offense. What is labelled as an acquittal flows from this legal ruling, but is not a conclusion or guilt or innocence by the factfinder. The trial has been terminated upon mid trial motions of the defendant upon an issue of law.

A recent Fifth Circuit case, remarkably similar on its facts to the instant one, shows that the Double Jeopardy clause does not bar further trial of Sanabria. In *United States* v. *Kehoe*, 516 F. 2d 78 (5th Cir. 1975) defendants were indicted for embezzling certain land from a savings association in violation of 18 U.S.C. § 657. After the jury was empanelled and the Government had presented its case-in-chief, the defendants moved for a judgement of acquittal on the ground that the indictment failed to state an offense since real property cannot be the subject of an embezzlement under § 657. The motion was granted. The

defendants were reindicted on the same facts, charging a violation of 18 U.S.C. § 1006. The District Court dismissed the second indictment citing the former acquittal as a bar to reprosecution.

On appeal the Fifth Circuit reversed holding that the original "acquittal" was only an apparent acquittal. It was really a discharge of the defendants after jeopardy has attached on the grounds that the indictment is incurably defective. In such a case retrial would be permitted after an application of a balancing of the defendants' interest to minimize the total period of jeopardy against the public's interest in justice. In *Kehoe* the balance fell on the side of retrial. In *Sanabria* this Court should make the same balancing of interests and order that Sanabria continue to a verdict on the merits by the jury.

Given the peculiar fact that this trial is still in session Sanabria's "acquittal" is not graven in stone. If the apparent acquittal is, like that in Kehoe, really a granted motion to dismiss it can be retracted by the Court.

> "We hold that under these circumstances the oral ruling has no legal significance and is not a judgement of acquittal barring further prosecution. The oral ruling of a trial judge is not immutable, and is of course subject to further reflection, reconsideration and change."

United States v. *Green*, 414 F. 2d 1174 (D.C. Cir. 1969)

Except for a few hours of happiness the position of Sanabria has not significantly changed as a result of this Courts ruling. The jury is still there suspended in legal time. Procedurally we are no further along than if this motion to reconsider were made an instant after the Court's

ruling. As *Kehoe* points out while Sanabria's belief that he has been acquitted is relevant to the Court's determination of the motion it is not conclusive. The Government has a paramount interest in a decision on the merits. The relief asked for in this motion would achieve a desirable result with no appreciable further burden on the Court since this trial will proceed anyway. This is far preferable to a whole new trial on the merits for Sanabria should the Government prevail on appeal of an adverse ruling on this motion.

Respectfully submitted,
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United States District Court
District of Massachusetts

CRIMINAL No. 72-326-S.

[Title omitted in printing.]

Excerpts from Transcript of Seventh Day of Trial.

[2] [The following is without the presence of the jury.]

THE COURT: Let's see who is missing.

MR. GOLDBERG: Mr. Redmond is not here, yet, your Honor.

MR. DiMENTO: Your Honor, may we have a moment to read this brief?

THE COURT: What brief?

MR. BOUDREAU: The Government has a Motion to Reconsider.

THE COURT: Do you have a brief?

MR. BOUDREAU: Yes, your Honor.

THE COURT: Perhaps I could take the time to read it, too.

All right, I've read it. Who is going to argue this?

MR. BOUDREAU: I am, your Honor, if I may.

THE COURT: Yes.

MR. BOUDREAU: Before proceeding, I would like to advise the Court that Mr. McDowell will argue at the conclusion of this motion, your Honor.

THE COURT: It depends upon the result of this motion.

MR. BOUDREAU: That's correct, your Honor. I just want to bring it to the Court's attention at [3] this time.

THE COURT: All right.

MR. BOUDREAU: Your Honor, the brief, which has just been submitted to the Court, contains a Motion to Reconsider the Court's ruling of yesterday's striking of evidence relating to the operation of an illegal parimutuel numbers pool, which was based on the Court's interpretation of Section 17 of the case of Commonwealth versus Boyle.

The Government would submit, your Honor, that under the Federal Rules relating to the pleading, the essential requirement is that the indictment contain an allegation of fact and that there be facts recited in the indictment which are sufficient to charge the offense and apprise the Defendant of the accusation to which he is to face, and that if an error is made in the citation of a statute, that that error is not a totally defective one, because it is not a matter of substance but rather a matter of form which can be corrected if the Defendant has not been misled to his prejudice.

I point out, your Honor, the indictment in this case specifically sets forth that the type of illegal gaming business to which the Defendants are [4] charged is the operation of an illegal parimutuel numbers pools and horse and dog racing, in violation of the laws of the Commonwealth of Massachusetts.

I submit, your Honor, that the Defendants were advised at the time of indictment of the nature of the charge that they were required to face, and that offense charged was in violation of Massachusetts General Law, the appropriate chapter.

They are based on the Court's interpretation of Section 17. That section does not encompass the parimutuel numbers pool. However, it's the Government's contention, your Honor, that the Defendants were adequately advised of the charges that they were required to face, that they

were required to face and the indictment charged a violation of Section 1955. I would submit, your Honor, in terms of pleading the indictment, as long as the facts are sufficiently set forth and the allegation required by Section 1955, that there is a violation of State law which is met, that there is not even a necessity in terms of defending against a Motion to Dismiss to set forth the specific State statute, which is violated.

In that connection, your Honor, I would direct the Court's attention to the case of United States [5] versus Kenny, which is stated in the brief.

THE COURT: I have no doubt about it. If you had cited no statute, you'd be all right. But the fact is you cited the statute, and it turns out not to be the one that covers the numbers pool. If you hadn't said anything, I don't have any doubt that it would have been a sufficient indictment. If the clause was in violation of the laws of Massachusetts, in which place said gaming business was being conducted, I think you would be home free. But having stated a section, I'm afraid that imports a specific offense.

MR. BOUDREAU: I would submit, your Honor, the requirements of 1955 are the specific elements contained within that statute, and that offense charged be in violation of State law. The offense that has been charged by the Government, the specific type of gambling business, which has been charged by the Government, is, in fact, in violation of the State law.

Now, with respect to the cases dealing with misciting of statute or incorrect citations of statutes, they all, your Honor, revolve around the question whether the Defendant has been misled or prejudiced in any way by the error in the citation [6] of the statute. We'd submit here, the factual allegations, your Honor, put the Defendants on notice, from the time of the indictment, that what the

Government was charging was the violation of the State law which supported the 1955 allegation, was the operation of a parimutuel numbers pool and a horse and contest on beasts.

In fact, your Honor, I think when the Court was making a ruling, yesterday, with respect to this question, the Court made the observation, "You're stuck with the indictment because it's clear that the theory of the Government's case and the proof of the Government's case has been a horse and numbers operation."

THE COURT: And there is support for your position in the fact that the Defendants have raised no objection to the numbers evidence all the time that it went in.

MR. BOUDREAU: Yes, your Honor.

THE COURT: Up to this point.

MR. BOUDREAU: I would submit that is a clear indication that they were aware of what they were being charged with, were not prejudiced by the miscitation or the error in the citation of the specific statute, a specific section of the statute, [7] which was contained within the indictment, and that there are two alternatives, your Honor. The Court could allow the Government to amend the indictment, which was set forth in United States versus Fruchtman, which is set forth in our brief, wherein the Defendant was charged with obstruction of investigation in violation of 18 U.S.C. 1503.

The person whose investigation was alleged to have been obstructed was a man by the name of Smeraldi, who was conducting an investigation of violations of antitrust laws. The underlying statute on which Mr. Smeraldi was proceeding was cited in the body of the indictment as is the case, here, your Honor, with respect to the Mass. General Laws. What was cited in the body of the indictment was

15 U.S. Code 13a, with no parentheses. When, in fact, it should have been 13 (a).

Now, the difference is, your Honor, they were two entirely different statutes. It's not a question of one section being next to the other or a mero matter or a minor matter of form. It's a question of the wrong underlying statute having been charged. In that instance, your Honor, at the conclusion of the Government's opening, the Defendant made a motion which the Court treated as a Motion to [8] Dismiss the indictment. The Court denied that motion and allowed the Government to amend the indictment to put in the citation of the proper statute.

On appeal the Defendant contended that the Government had been impermissibly allowed to amend the indictment, and the Court of Appeals in affirming the conviction stated, and I quote: "The original indictment fairly stated the facts upon which the charges were based, but in describing the investigation conducted by Smeraldi it was erroneously stated that he was proceeding upon Section 13A instead of 13(a) of Title 15, United States Code. Appellant has not demonstrated that he was misled or prejudiced by reason of the amendment. The amendment was a non-prejudicial change of form and was properly permitted to be made."

I submit, the citation of the proper chapter of the Massachusetts General Laws and the fact that the allegation was made that the illegal gaming business charged was in violation of State law, coupled with the factual basis for the allegation, that is, that it was in operation of an illegal parimutuel numbers pool and contest of skill on beasts, properly advised the Defendants of the charges they were required to meet and alleged all the elements of Section 1955.

[9] There is a First Circuit case I would like to direct the attention of the Court to, your Honor, the case of United States versus Van West, which is the First Circuit case, 455 F. 2d, 958, in which a Defendant was arrested on a complaint and charged with assault on a Federal officer in violation of Section 111 of Title 18, United States Code. Thereafter, a one-count indictment was returned, and he was charged with violation of Sections 113 and 114 of Title 18, United States Code, which related to maritime jurisdiction and other matters not covered within Section 111, your Honor.

The trial proceeded, and the Defendant contended that he was misled by the erroneous citation in the statute. The First Circuit held that the appellant's contention was without merit, because the facts of the indictment fairly apprised him of the charge, and from the proceedings in the case, that is, the Defendant's counsel's examination of the Government's witnesses, it was clear he was concerned with the specific allegation of the indictment which set forth a case precisely within Section 111.

The Defendant claimed he was misled by the penalty provision, which under 111 is larger than under 114, might be relevant if he had pled guilty, [10] but had gone to trial. So, I think, your Honor, both the fact the Government's contention that this is a technical error, which can be corrected, and the procedures within the trial themselves, show that the Defendants have not been prejudiced by the citation of Section 17 alone, your Honor.

THE COURT: All right. Who is going to respond to that?

MR. DIMENTO: I will, your Honor. First of all, your Honor, this case is not as if Section 1955 in the indictment had been miscited. That is at the very end when it says, "All in violation of Title 18, United States Code, Sections 1955 and 2." If that phrase had read in violation of

Sections 1954 or 638, whatever, I would have no complaint here, and I realize that I would have no standing. That is a miscitation that can be corrected. That is the type of case that has been cited by the Government's counsel.

THE COURT: All right. I would appreciate it if you would address yourself to what I think is right now the most serious issue, and that is the fact that this case has been sitting around for three years. Motions of every kind and description were brought over that period, innumerable hearings, six days of [11] trial, and finally at whatever it was, quarter of eleven yesterday, the question of the application of the statute is finally brought to the Court's attention.

MR. DIMENTO: Well, your Honor, that is because —

THE COURT: How can you allege prejudice at that point?

MR. DIMENTO: I don't think I have to allege prejudice. That is because I was acting as a technician, in taking matters as they arose. My Motion to Strike did not ripen until the Government brought to the attention of the Court Section 17 and asked that the Court take judicial notice and actually handed the Court a copy of the statute.

THE COURT: That was in the indictment, and at no time during the course of this trial did anybody object to the introduction of evidence on the subject of numbers. What do you have to say to that?

MR. DIMENTO: What I'm saying, your Honor, it did not become objectionable until the point in the trial which the Court was asked to take judicial notice and handed the statute. Only then would a lawyer who is acting according to procedure —

THE COURT: You mean to say if this thing had alleged — well, this thing did allege Section 17. [12] That didn't put you on notice as to what the theory of the Government's

case was and that didn't raise an obligation on your part to object at every stage?

MR. DIMENTO: Well, the last part first, did not raise an allegation on my part, because acting according to procedure, which I consider to be correct procedure, motion, the objection or the Motion to Strike did not ripen until such time as the Court was asked to take judicial notice of the statute.

If the Court had been asked at the beginning of the trial, I planned to raise it then. I expected, actually, that it be asked at the beginning of the trial, but it was not. It was not asked until the end of the trial.

THE COURT: I don't follow that. I don't think that's right at all.

MR. DIMENTO: I think what Section 17 states, of course, your Honor —

THE COURT: You let all of this stuff come in.

MR. DIMENTO: Pardon?

THE COURT: You let all of this stuff come in without saying a word. You sat there without objection to the numbers part of the evidence as it came in, is that right?

[13] MR. DIMENTO: To a large extent, your Honor, the numbers part of the evidence was intermingled with other evidence.

THE COURT: You certainly could object to parts of pieces of evidence.

MR. DIMENTO: If I called it to your attention, I'm sure you would have ruled upon it, but I didn't feel at that time that it was ripe, because we still didn't have Section 17 before us. Section 17, as a matter of evidence, is not as 1955 is, merely an appendage to the charge, it's a matter of evidence in the case, a matter of judicial notice.

THE COURT: It's a matter of judicial notice.

MR. DIMENTO: Which makes it a matter of notice.

THE COURT: Whether it's necessary that that be specifically drawn to my attention or not, I don't know.

MR. DIMENTO: And, actually, your Honor, if you want to know something else that happened, was that I didn't even look at the paraphernalia, the documentation, until at the end of the trial, and never realized how much — I know, it's my own fault.

THE COURT: A man saying, "This is an envelope with six day numbers in it" —

[14] MR. DIMENTO: Yes, I didn't look at the size of the bulk of it until the end of the trial.

THE COURT: That is your problem.

MR. DIMENTO: Yes. You asked how it happened.

THE COURT: I didn't really ask how it happened, I asked what is your view of the significance of it?

MR. DIMENTO: Okay. My view of the significance of it is I'm entitled to rely on procedures followed in the Courts. That is what lawyers are for. If I didn't follow procedures, my clients would try the case. That is why I'm here, because I try to follow rules of the Court.

THE COURT: I don't know of any rule that would have prevented you from raising the objection to the numbers evidence.

MR. DIMENTO: I agree, your Honor, that if I had, you might very well have acted upon it at that time. But no harm has been done to the Government by this, because we can ex[c]ise it now as easily as we could have before.

THE COURT: Well, no, we can't. It will be quite a job to ex[c]ise all of that stuff.

MR. DIMENTO: The job has been done. The [15] Government has given us a list of everything they agreed to this morning.

THE COURT: I see, all right.

MR. DIMENTO: So it's just a matter of physically separating out certain items.

THE COURT: What's the reference on judicial notice of State statutes, do you know, offhand?

MR. DIMENTO: I don't now offhand, your Honor, no.

THE COURT: Anything further?

MR. DIMENTO: Let me just consult my notes. Well, I would only repeat what you've already said. This is not surplusage, the citation, it's descriptive of an essential element of the crime. I agree with the Court that if the Government had chosen to allege that it was an illegal gambling business in violation of Massachusetts law, then it would have been incumbent upon me to seek particulars, and the Government would not be bound, as it is now, but having specified within the indictment the particular business in violation, as I submit, they are stuck with it; it's not a matter of prejudice because there is no prejudice.

The inconvenience is the same on both sides. The separation has already been made. The jury hasn't [16] even seen the exhibits, except from a distance, and there is just no difference now, whether you take it out now or you take it out during the trial.

MR. REDMOND: Could I just say one thing, your Honor?

THE COURT: Yes.

MR. REDMOND: I would just like to call to your Honor's attention, while I sat here all of last week, I was in a slightly different position from my brothers, here, and that is, as your Honor well knows, there wasn't one slip of paper that was originally offered against Arthur Plotkin, horse, number, sports, or anything. My objection was, on the first piece of evidence, documentary evidence, that was asked, as your Honor perhaps remembers, I was the one that stood up and said I wanted limitations, and there were

limitations on everything all the way through. I couldn't object if it wasn't being offered against me.

THE COURT: There was a numbers, purely numbers telephone call that you let come in without raising this particular objection.

MR. REDMOND: I know, but I had objected.

THE COURT: I don't fault you on raising every other objection that you could think of, you [17] did that. But nobody raised this point until yesterday morning.

MR. REDMOND: That goes back to what Mr. DiMento is saying. I'm talking now specifically about the documentary evidence, your Honor. There certainly was no obligation on me, your Honor.

THE COURT: The obligation on you came at the point where the telephone conversation came up which dealt only with numbers, and you didn't speak then, either. I appreciate what you say about the documents.

Does anybody else want to say anything?

MR. BOUDREAU: Could I just respond very briefly to Mr. DiMento's comments? He made the statement the Government is in no different position now. I submit, the Government is in an entirely different position, now. The case is, you know, totally disorganized and fragmented because the contention is raised at this point in time, when it could have been raised as an attack upon the indictment, pretrial, and that Section 17 factually — the Government set forth it was contending the Defendants had participated in the operation of an illegal numbers pool and cited the specific section as Section 17. The Defendants [18] could have made an attack upon the indictment at that time. They also could have objected to the introduction of evidence, as it was coming in. Now, after they've waited until the case is concluded, now they want to say it's not a technical error that could have been corrected at some point in time.

The factual allegations have been there all the time, and the Government has not deviated in any respect, whatsoever, from the allegations contained in the indictment in this case.

With respect to the evidence that's to be excised, your Honor, there has been agreement with respect to considerable portions, but not all of the evidence. There are some contested items of evidence, some which the Government feels is horse or sports operations. Some of the evidence is mixed, your Honor.

THE COURT: Well, mixed evidence will go in.

MR. DIMENTO: We have no objection to that.

THE COURT: I think the rule is loaded. It isn't as I read it and have understood it over the years. The rule of pleading is not a bald one, that is to say, it's loaded against the Government. The sensitivity which the Courts have for the rights of defendants has brought this about, and with some [19] reluctance, with considerable reluctance, I'm going to deny the Government's motion and the matter will stay just as it was with some reluctance in view of the posture of the case at that time in what I consider to be the failure of the Government to make a timely objection, I'm still going to deny the motion because the question of identification of the crime charged is such a basic one in the criminal law that we'll go forward.

MR. MCDOWELL: Your Honor, while I don't intend to argue, I would like to offer the Motion on Reconsideration on Sanabria.

THE COURT: Well, it has no bearing now.

MR. MCDOWELL: Should the Solicitor General authorize an appeal on the granting of the Motion to Acquit, it's incumbent upon the Government to make a motion at a time when you will have a chance to act on it to preserve the record.

THE COURT: I will not hear argument on it, but I will tell you what my view is on it.

If the other motion had been granted, I think, probably, the Motion to Reconsider the Acquittal of Sanabria would be allowed under these new decisions: Wilson, which is in 420 US 322; Jenkins, 420 US 358; and Serfass at 420 US 377, all decided the last term. All of those seem to say if a judgment of acquittal [20] or judgment of dismissal is entered on legal grounds as opposed to containing or importing a finding of fact and the reversal of that decision would not require a new trial, then it may be reversed.

Now, the other cases, the case that Mr. DiMento was talking about last night involving the U. S. Attorney out of this District, went to the Supreme Court and the name of it is Foo Fong versus the United States. I think I have that right.

MR. MCDOWELL: Fong Foo, your Honor.

THE COURT: Fong Foo, all right. In Fong Foo the jury had been discharged, and it would have been necessary to draw a new jury and start a new trial, and in Jenkins they specifically distinguished Fong Foo from the Wilson-Jenkins-Serfass group, so it would have been my ruling — I'm getting this on the record so you can do what you want to do with it.

MR. MCDOWELL: I appreciate that, your Honor.

THE COURT: It would have been my ruling if I allowed the Motion to Amend, I probably would have allowed the Motion to Reconsider the Judgment of Acquittal on Sanabria under these new rules. I really consider these group of cases a departure from the prior rule, but there they are. These are the fellows that call the tune.

[21] I'm not going to hear argument on it because I'm just filling out the record for Mr. McDowell.

. . . . . .

[32] THE COURT: All right. We will leave them in if it's an open question.

One of the bases of this is that this matter, having come at this time in the trial, the burden is on the Defendant to show that these things should be stricken. If there is a mixed bag, it stays in. I do not buy the argument submitted by Mr. DiMento on the delay of raising this issue.

• • • • • • • • •

[51] THE COURT: Ladies and gentlemen of the jury, good morning. We have now come to the point of argument on a case, as I said yesterday, that is somewhat different than it was when it started off. This is because of a ruling I have made concerning the reference in the indictment to Section 17 of Chapter 271 of the Massachusetts General Laws, which I have ruled to take out of the case, the involvement of these Defendants in a business, a gambling business having to do with the numbers pool. The bulk of the evidence, physical evidence, that is, the documents having to do with the numbers, those have been withdrawn from the exhibits. There will be some matters having to do with numbers that are still in [52] there. The significance of which, I will tell you about in the course of the instructions.

The other thing that has happened is that the case against Thomas Sanabria is no longer before you because there wasn't any other kind of evidence introduced against him except evidence having to do with the numbers pool. So that Defendant is no longer a part of this case.

• • • • • • • • •

No. 76-1040

In the Supreme Court of the United States

OCTOBER TERM, 1976

THOMAS SANABRIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

FRANK H. EASTERBROOK,
Assistant to the Solicitor General,
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THOMAS SANABRIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 548 F. 2d 1.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13a) was entered on December 29, 1976. The petition for a writ of certiorari was not filed until January 29, 1977, and is therefore out of time under Rule 22(2) of the Rules of this Court.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]On February 11, 1977, petitioner filed a "Motion to Waive Supreme Court Rule 22(2) and Deem Petition for Certiorari Timely Filed."

QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause prohibits a second trial after the district court, at the defendant's request, termininated a prosecution prior to verdict on the ground that the indictment failed to provide sufficient notice of the crime charged.

2. Whether an indictment that clearly describes all of the elements of the crime charged is insufficient because it does not refer to the correct statutory provision.

STATEMENT

1. Petitioner and ten co-defendants were tried before a jury in the United States District Court for the District of Massachusetts on a one-count indictment charging that they conducted—

> an illegal gambling business, to wit, accepting, recording and registering bets and wagers on a pari-mutual number pool and on the result of a trial and contest of skill, speed, and endurance of beast, said illegal gambling business; (i) was a violation of the laws of the Commonwealth of Massachusetts, to wit, M.G.L.A. Chapter 271, Section 17, in which place said gambling business was being conducted; (ii) involved five and more persons who conducted, financed, managed, supervised, directed, and owned all and a part of said business; (iii) had been in substantially continuous operation for a period in excess of thirty days and had a gross revenue of two thousand dollars ($2,000) in any single day; all in violation of Title 18, United States Code, Sections 1955 and 2.

The government's case consumed five trial days.[2] At the close of the government's case, all 11 defendants moved for judgments of acquittal. Counsel for petitioner argued that the "numbers" charge against him was made a crime not by Mass. Gen. L., ch. 271, Section 17 (as the indictment had specified) but by Mass. Gen. L., ch. 271, Section 7 (1968) (6 Tr. 22-24). Petitioner had not raised this contention before trial (although pretrial proceedings had consumed three years (Pet. App. 2a)), nor had he raised it earlier in the trial. The district court denied the motions to acquit, and it also denied a motion to strike evidence pertaining to the numbers pool allegation (6 Tr. 38-45). After one of petitioner's co-defendants presented a witness and another a stipulation, all of the defendants rested. The defendants, including petitioner, renewed their motions for judgments of acquittal, and the district court denied them again (6 Tr. 73).

Following a brief recess, however, the district court changed its mind and concluded that "Section 17 [of Mass. Gen. L., ch. 271] does not include the numbers aspect" of the charge (6 Tr. 75-76). On this reasoning the court struck "so much of the evidence in the case as had to do with numbers betting" (6 Tr. 76) but held that the case would be submitted to the jury insofar as the defendants were charged with conducting a horse betting business. The prosecutor told the court that petitioner had been connected by the evidence to the numbers operation but not the horse betting operation, and the court then granted petitioner's motion for a judgment of acquittal (6 Tr. 80-86).

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[2]The evidence adduced by the government showed that the defendants were involved, either as owners or salaried or commissioned workers, in an illegal numbers and horse gambling business in Revere, Massachusetts. The illegal enterprise also involved betting on sporting events other than horse races. The operation was broken up when agents of the Federal Bureau of Investigation raided three locations of the business and seized betting records.

At the resumption of trial the next day, the prosecutor filed motions requesting the court to reconsider the judgment of acquittal, to reconsider the ruling striking the evidence concerning the operation of the number pool, and to permit the government to amend the indictment. Although the district court expressed concern that the defendants had not earlier raised the issue of the alleged defect in the indictment (7 Tr. 10-17),[3] it nevertheless denied the government's motions for reconsideration, stating that it did so with "considerable reluctance" (7 Tr. 18-19). The court indicated that its acquittal of petitioner rested entirely upon its perception that the indictment was defective on its face (7 Tr. 19-20).

The court then submitted the case against petitioner's ten co-defendants to the jury on the theory that they had accepted wagers on horse races. The jury found all ten guilty.

2. The court of appeals held that a second trial of petitioner on the "numbers" aspect of the indictment would not violate the Double Jeopardy Clause, because petitioner had requested the termination of the prosecution and had surrendered his valued right to receive the verdict of the jury. The court of appeals explained (Pet. App. 11a):

> Since [petitioner] voluntarily requested termination of proceedings based upon the numbers activities before there had been any determinations regarding either his conduct or its legal consequences, and since there can be no suggestion that [petitioner's] request was attributable to developments resulting from prosecutorial or judicial overreaching, we hold that there is no double jeopardy bar to a future prosecution on this cause.

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[3]Pretrial proceedings in this case had taken three years (Pet. App. 2a).

The court of appeals also concluded that the district court's order terminating the prosecution against petitioner was erroneous. Relying upon *United States* v. *Morrison*, 531 F. 2d 1089, 1094 (C.A. 1), certiorari denied, October 4, 1976 (No. 75-6598), which had held that the citation of Section 17 rather than Section 7 of the Massachusetts statute does not make a federal indictment insufficient, the court of appeals remanded for a second trial (Pet. App. 4a, 12a). This trial is to be confined to the "numbers" aspect of the charge in light of the prosecution's failure, at the first trial, to connect petitioner to the horse betting aspect of the gambling operation; the United States did not seek a second trial on the horse betting aspect of the charge.

DISCUSSION

1. The double jeopardy considerations presented by this case are similar to those in *Lee* v. *United States*, No. 76-5187, certiorari granted, January 10, 1977. In *Lee* the defendant moved, after the commencement of a bench trial, to dismiss the information on the ground that it failed to apprise him of all of the elements of the offense. The district court took the motion under advisement, heard evidence, and later dismissed the information. Lee was indicted and tried a second time; his case presents the question whether that second trial violated the Double Jeopardy Clause.

Here, as in *Lee*, after the trial began petitioner moved for a judgment in his favor on the ground that the indictment was facially defective. Here, as in *Lee*, the district court granted that motion after all of the evidence had been received, but without purporting to resolve any factual disputes. There are three differences between this case and *Lee*, none of which justifies more favorable treatment for petitioner: (i) in *Lee* the defendant moved to dismiss the information before the technical "attachment" of jeopardy (but after the trial had begun), whereas here petitioner did

not attack the sufficiency of the indictment until the sixth day of trial; (ii) in *Lee* the information was indeed defective, whereas here petitioner was not entitled to the relief he sought (see page 10, *infra*); (iii) in *Lee* the district court stated that it was dismissing the information, whereas here the court stated that it was acquitting petitioner.[4]

Although jeopardy did not "attach" in *Lee* until after the motion to dismiss was made, we have argued (*Lee* Br. 31-36) that this is not fatal because Lee himself brought this about by delaying, until after the prosecutor's opening statement, making his attack upon the charge; the delay that took place in the instant case was even more pronounced.[5]

We have argued in *Lee* (Br. 14-27) that a defendant who moves in mid-trial to terminate the proceedings against him cannot raise a double jeopardy objection if the prosecutor seeks to try him again. See *United States* v. *Dinitz*, 424 U.S. 600. If the first trial was properly terminated, as in *Lee*, a second trial is permissible if the defect can be corrected. If the first trial should not have been terminated—if, as here, the defendant seeks and receives a form of relief to which he is not entitled—a second trial may follow a reversal on appeal.[6]

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[4]We have furnished to counsel for petitioner a copy of our brief in *Lee*.

[5]See *United States* v. *Kehoe*, 516 F. 2d 78 (C.A. 5), certiorari denied, 424 U.S. 909 (a defendant who has an opportunity to have legal issues resolved before trial, but who intentionally waits until jeopardy has attached before seeking their resolution, cannot object on double jeopardy grounds to another trial).

[6]Cf. *Serfass* v. *United States*, 420 U.S. 377, 394, which reserves the question presented here: whether a defendant who is afforded an opportunity to obtain a determination of a legal defense prior to trial and nevertheless knowingly allows himself to be placed in jeopardy before raising the defense can interpose a double jeopardy objection to a second trial when the district court erroneously accepts his defense.

It does not make a difference that the termination in *Lee* was called a dismissal of the information, while the termination in the present case was called an acquittal. As the Court explained in *United States* v. *Martin Linen Supply Co.*, No. 76-120, decided April 4, 1977, slip op. 7, "what constitutes an 'acquittal' is not to be controlled by the form of the judge's action." Here, as in *Lee*, the district court has done no more than conclude that the charge was defective on its face; in the words of the court of appeals (Pet. App. 8a-9a), "[n]either the judge nor the jury ever focused on what the evidence of numbering activities established regarding [petitioner's] conduct or on whether the alleged conduct was such that criminal liability could be imposed. Because of this fact, a future prosecution in this case will not threaten one of the principal private interests protected by the clause: the criminal defendant's interest in preserving a district court's ruling that he is not criminally responsible." In *Martin Linen*, by contrast, the district court's action was a true acquittal because (slip op. 8) the court "evaluated the government's evidence and determined that it was legally insufficient to sustain a conviction." In the present case the district court did not examine the sufficiency of the evidence pertaining to the numbers crime; it ruled, instead, that the indictment did not adequately charge the numbers offense.

If the Court accepts our major argument in *Lee*, therefore, it would follow directly that petitioner may be tried a second time. If, however, the Court should conclude in *Lee* that the attachment of jeopardy after the defendant had moved to dismiss, a factor not present here, is important, then it might not reach our major argument. If the Court should decide *Lee* in a way that leaves open any important questions concerning the propriety of the approach we have taken, then we believe that the Court should grant review in another case presenting similar questions. It could grant

review of the instant case, of *United States* v. *Scott*, 544 F. 2d 903 (C.A. 6), petition for a writ of certiorari pending, No. 76-1382, or of both. This case and *Scott* would offer the Court the opportunity to address whatever questions may be left open by *Lee*.[7]

2. Petitioner's other arguments do not warrant review by this Court, and if it grants review of this case it should limit the grant to questions 1 and 2 of the petition, which, taken together, raise the first question we have reformulated at page 2, *supra*.

a. Petitioner contends (Pet. 13-18) that the appeal in this case was not authorized by the Criminal Appeals Act, 18 U.S.C. 3731, because the district court's order should be viewed as a mid-trial order suppressing evidence. But the district court's decision was based entirely upon the sufficiency of the indictment; the court held that the indictment was defective on its face. This is a legal decision of the sort that can be appealed under the first paragraph of Section 3731. As the Court explained in *United States* v. *Wilson*, 420 U.S. 332, 337, "Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." See also *United States* v. *Martin Linen Supply Co.*, *supra*, slip op. 3-4. Consequently, the only

[7] In *Scott* the district court, at the close of all the evidence, dismissed one count of the indictment at Scott's request because of preaccusation delay. The court of appeals dismissed our appeal, holding that the Double Jeopardy Clause precludes a second trial. *Scott* unquestionably involves an order dismissing the indictment rather than granting a true acquittal (see *United States* v. *Martin Linen Supply Co.*, *supra*, slip op. 1 n. 1 (Stevens, J., concurring)); although the dismissal was based on the evidence heard at trial, the dismissal did not resolve the general issue. We have furnished a copy of our petition in *Scott* to counsel for petitioner.

question that an appellate court need consider in an appeal by the United States is whether the Double Jeopardy Clause would bar a second trial if the government were to prevail on appeal.

It is unimportant that the district court excluded all of the "numbers" evidence before terminating the proceedings against petitioner. That exclusion of evidence was based upon the district court's belief that the indictment was defective. The United States did not appeal the exclusion of evidence under the second paragraph of Section 3731; it appealed, instead, under the first paragraph of Section 3731.[8] The appeal is authorized because the district court's "acquittal" terminated the proceedings in petitioner's favor, and the first paragraph, as interpreted in *Wilson* and *Martin Linen*, authorizes an appeal from an order terminating the prosecution unless the Double Jeopardy Clause bars the way.

b. Petitioner also contends (Pet. 10-12) that Section 3731 does not authorize an appeal from an order dismissing part of a count of an indictment but not all of the count. The court of appeals considered and rejected this argument (Pet. App. 4a-7a); we rely upon its opinion. As we have pointed out, the Criminal Appeals Act removes all non-constitutional bars to appeals by the United States in criminal cases. Moreover, even if the Act were read as requiring appeals only from dismissals of entire counts of

[8] It is true, as petitioner points out, that the second paragraph of the Criminal Appeals Act does not authorize appeals from orders entered after the attachment of jeopardy and prior to verdict. But the second paragraph deals only with *interlocutory* appeals, and the purpose of the limitation was to prevent the interruption of an ongoing trial by an interlocutory appeal. Once the trial has ended in a final judgment, however, the prosecution's right to appeal is conferred by the first paragraph. See also Pet. App. 6a n. 5.

indictments, that condition would be satisfied here. The district court terminated the entire prosecution with respect to petitioner. Although, in light of the arguments the United States made on appeal, the court of appeals did not remand for a second trial on the horse betting portion of the gambling enterprise, there was only a single gambling enterprise, albeit one that could be proved in several ways. The court of appeals' decision to limit the second trial to proof of the "numbers" operation did not deprive it of jurisdiction.

c. Petitioner finally argues (Pet. 21-22) that the court of appeals erred in holding that the indictment was sufficient. But the indictment alleged all of the elements of the offense. Petitioner conceded at trial (7 Tr. 15) that the citation to the wrong section of Massachusetts statute did not hinder his defense or deprive him of notice of any element of the crime he is alleged to have committed. Since the failure to cite the correct statute is not a reason to dismiss an indictment in the absence of prejudice, the miscitation was not a fatal flaw. Fed. R. Crim. P. 7(c)(3); *Hagner* v. *United States*, 285 U.S. 427, 431; *United States* v. *Morrison, supra.*[9]

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[9]Petitioner relies (Pet. 21) upon *United States* v. *Prejean*, 494 F. 2d 495 (C.A. 5), for the proposition that the failure to cite the proper section of the statute deprived him of his Fifth Amendment right to indictment by grand jury. But the grand jury charged explicitly that petitioner accepted, recorded, and registered bets on a "numbers" pool, and petitioner does not contend that this charge omits any element of the Massachusetts crime. The right to be indicted by a grand jury comprehends only a right to have the grand jury state all of the elements of the offense. In *Prejean*, upon which petitioner erroneously relies, the defendant was tried on an indictment charging different elements from those of the crime established by the statute that should have been cited. In *Prejean* there was no way to know whether the grand jury would have made the allegations necessary to establish the elements of the offense under which the defendant should have been charged; quite the contrary is true here, for the grand jury charged all of the elements of the correct offense and then simply cited the wrong section of the statute.

CONCLUSION

Consideration of the petition should be deferred pending the Court's decision in *Lee*.

Respectfully submitted.

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Assistant to the Solicitor General.

APRIL 1977.

In the
Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 76-1040.

THOMAS SANABRIA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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IN THE
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October Term, 1977.

No. 76-1040

THOMAS SANABRIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 548 F.2d 1.

Jurisdiction

The judgment of the court of appeals (Pet. App. 13a) was entered on December 29, 1976. The petition for a writ of certio-

rari was filed on January 29, 1977.[1] The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional Provision and Statute Involved

The Fifth Amendment to the United States Constitution provides in pertinent part:

> ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ."

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1 Despite the fact that petitioner and his counsel acted diligently to ensure that the petition would be timely filed, the petition was filed nine hours later than the time prescribed by Rule 22(2) of the Rules of this Court. On February 11, 1977, petitioner filed a Motion to Waive Supreme Court Rule 22(2) and Deem Petition for Certiorari Timely Filed. This motion and four accompanying affidavits detail the efforts made to ensure that the petition would be timely filed, and explain that the only reason it was not in fact timely filed was because a messenger, unaccountably, and without notifying anyone, failed to follow the emphatic instructions he had been given. It is well established that lateness in the filing of a petition for certiorari in a federal criminal case is not a jurisdictional defect, and may be waived by

(cont. on page 3)

Section 3731 of Title 18 of the United States Code provides in pertinent part:

> "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

Questions Presented

The petitioner was charged in a single-count indictment with violating 18 U.S.C. §1955, which makes it a federal crime to engage in "an illegal gambling business." The federal statute defines such a business as one which, among other things, involves five or more persons and is in violation of state law. At petitioner's trial, the Government introduced

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1 (cont. from page 2)

this Court in the exercise of its discretion. E.g., Schacht v. United States, 398 U.S. 58, 64 (1970); Durham v. United States, 401 U.S. 481 (1971); Taglianetti v. United States, 394 U.S. 316, n. 1 (1969).

evidence that the single gambling business charged in the indictment involved illegal state betting on (a) horse races, and (b) numbers. The court excluded evidence of the numbers activity on the ground that this theory of criminal liability was not encompassed by the indictment. The court then found that the evidence of horse betting was insufficient to support a conviction, and entered a judgment acquitting the petitioner.

1. Do 18 U.S.C. §3731 and the double jeopardy clause permit the Government to appeal from the judgment of acquittal?

2. Can petitioner be retried on the basis of the numbers evidence consistent with the Constitutional guarantee that no person shall be twiced placed in jeopardy for "the same offense"?

3. Do 18 U.S.C. §3731 and the double jeopardy clause permit the Government to obtain review of the district court's ruling on the numbers evidence considering that

a. it was not the dismissal of

an entire count of an indictment?

b. it was an evidentiary ruling made after jeopardy had attached?

Statement of the Case

Petitioner and ten codefendants were tried for allegedly violating 18 U.S.C. §1955, which makes it a federal crime to engage in an "illegal gambling business." The federal statute defines such a business as one which (i) is in violation of state law, (ii) involves five or more persons, and (iii) has been in continuous operation for more than thirty days or has a gross revenue of $2,000 in any single day. The single-count indictment (Pet. App. 15a-16a) charged the defendants with engaging in:

> "an illegal gambling business [involving] . . . accepting, recording, and registering bets and wagers on a partimutual [sic] number pool and on the result of a trial and contest of skill, speed and endurance of beast . . . [in] violation of the laws of the Commonwealth of Massachusetts, to wit, M.G.L.A. Chapter 271, Section 17 . . . ."

At trial, the Government introduced evidence purporting to show that the

single gambling business charged in the indictment involved illegal state betting on (a) horse races, and (b) numbers. At the close of the Government's case, petitioner and his codefendants moved to strike as irrelevant that portion of the Government's evidence which pertained to numbers activity. A. 4-12. They argued that the only Massachusetts statute cited in the indictment -- Mass. G.L. c. 271, §17 -- had been interpreted by the Massachusetts courts to pertain exclusively to gambling activity involving apparatus used in betting on a game of competition, such as horse racing. Id. They maintained that numbers activity was prohibited only by Mass. G.L. c. 271, §7. Id.

The district court initially denied this motion (A. 12) but, on the basis of legal research it did in an intervening recess, changed its decision after both sides had rested. A. 12-13. Accordingly, the district court excluded the Government's evidence of numbers activity and ruled that the case could go to the jury solely on the Government's horse betting theory. Id.

Petitioner then moved for a judgment

of acquittal on the ground that there was insufficient evidence of his involvement in horse betting to support his conviction on this basis. A. 16-20. Focusing on the evidence of horse betting against petitioner, and finding that it was indeed insufficient, the district court granted his motion. Id.

The Government sought appellate review of the district court's judgment acquitting the petitioner. It conceded that there could be no review of the ruling that there was insufficient evidence of petitioner's involvement in horse betting to support a conviction on that theory. Pet. App. 3a. But it maintained that there could be review of the decision to exclude the evidence of numbers activity, and requested that a new trial be ordered to give the Government the opportunity to convict petitioner on that theory. Id.

Observing that the case presented "several substantial questions" concerning the Government's right to appeal from an adverse decision in a criminal case (Pet. App. 2a), the court of appeals found that the district court's decision to exclude

the evidence of numbers activity was indeed reviewable. Id. at 4a-12a. Turning to the merits, it ruled that the lower court had erred in "dismissing" the "numbers based charge" and remanded the case so that the Government could retry the defendant on this "portion of the indictment." Id. at 3a-4a, 12a.

In finding reviewable the district court's ruling on the evidence of numbers activities, the court of appeals considered two issues: first, whether the appeal was authorized by the Criminal Appeals Act, 18 U.S.C. §3731; and, second, whether further prosecution of the defendant under 18 U.S.C. §1955 was permitted under the double jeopardy clause. Pet. App. 4a-12a.

The court of appeals found that the first issue arose because the ruling on the numbers evidence was "not formally a dismissal of an entire count" of an indictment as 18 U.S.C. §3731 seemed to require. Pet. App. 5a. Nevertheless, the court found that an appeal was authorized because it interpreted the word "count" in the statute not as a term of art but as a shorthand expression for

"any discrete basis for the imposition of criminal liability that is contained in the indictment." Id. at 5a-7a. Thus, since the district court's ruling on numbers evidence "clearly eliminated one basis for imposing criminal liability on defendant," the Government could appeal even though the ruling was not the dismissal of an entire count. Id.

Turning to the double jeopardy issue, the court found that like a motion for a mistrial, petitioner's motion to exclude the evidence of numbers activity was an election "to forego his valuable right to have his trial on numbers charges concluded by the first tribunal." Pet. App. 11a. Consequently, the court concluded that further prosecution of petitioner was permitted under the decisions authorizing further prosecution after a defendant's voluntary motion for a mistrial. Id.

The court of appeals did not address the issue of what justified its implicit assumption that the district court's ruling on numbers evidence could be reviewed separately from the judgment of acquittal. Nor did the court of appeals

discuss the question of whether prosecution of the petitioner on the basis of numbers evidence would be a prosecution for "the same offense" of which petitioner had been acquitted. Indeed, the only argument the court of appeals offered in support of its premise that the indictment could properly be regarded as making two distinct charges -- a horse betting charge, and a numbers charge -- was that the defendant "could possibly have made a pretrial objection to the indictment as duplicitous." Pet. App. 5a, n. 4.[2]

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2 In fact, as this brief demonstrates, the indictment was not duplicitous (see section II.B. infra), the district court's ruling on numbers evidence could not be reviewed separately from the judgment of acquittal (see pp. 11-13 infra), and a second trial of petitioner on the basis of numbers evidence would be a prosecution for "the same offense" of which petitioner was acquitted (see section II.A. infra).

Introduction and Summary of Argument

The decision of the court of appeals rests on the fundamental misconception that this case can be split into two separate and distinct parts. Thus, the court reads the indictment as charging two discrete offenses against the petitioner -- a horse betting offense, and a numbers betting offense. And the court compounds this error by viewing the district court as having made two independent decisions -- (1) a "ruling that there was insufficient evidence of horse betting to support a conviction" (Pet. App. 3a); and (2) a "dismissal" of the "numbers based charge" (Id. at 12a) on the ground that the indictment failed to give petitioner "sufficient notice" of that charge (Id. at 8a).

In fact, this case is bound into an indivisible whole by two overarching unities which the court of appeals all but ignores: (1) the single-count indictment charging that petitioner committed but one crime (engaging in an illegal gambling business in violation of 18 U.S.C. §1955) and (2) the unitary judgment acquitting

petitioner of that crime.

To split in two both the indictment and the judgment of acquittal for the purpose of extracting an appealable ruling is to misconceive the interest in finality which the double jeopardy clause was designed to protect. For acquittals and other prosecution-terminating judgments to be truly final, the underlying rulings on which they are based must be regarded as being merged into the judgments themselves. Thus, in Fong Foo v. United States, 369 U.S. 141, 143 (1962), this Court held that even if an acquittal was based:

> "upon an egregiously erroneous foundation . . . [n]evertheless, 'the verdict of acquittal was final, and could not be reviewed . . . without putting [the defendants] twice in jeopardy, and thereby violating the Constitution.'"

Accord, United States v. Martin Linen Supply Co., 97 S.Ct. 1349, 1354 (1977).

Here the district court's ruling excluding the numbers evidence was but one of many rulings that formed the foundation for the judgment of acquittal ultimately entered. To allow appellate

review of that ruling on the theory that it constituted a "dismissal" of "a discrete basis of criminal liability" is to undermine the finality of all acquittals by implicitly inviting the prosecution to go behind them in search of similar "appealable" "dismissals." Indeed, there is no end to the decisions that could be rendered "appealable" in this manner because virtually every decision excluding evidence can be characterized as "dismissing" a "basis of criminal liability."

In Brown v. Ohio, 45 U.S.L.W. 4697, 4700 (U.S. 1977), this Court stated:

> "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units."

Similarly, the double jeopardy clause cannot be avoided through the expedient of dividing a single crime into layers of "discrete bases of criminal liability." But here, by splitting the single crime charged in the one-count indictment into a horse betting offense and a numbers betting offense, that is precisely what the Government has attempted to do.

Petitioner was tried on a one-count indictment for the crime of engaging in an illegal gambling business in violation of 18 U.S.C. §1955. After petitioner was placed in jeopardy, and after both prosecution and defense presented their cases and rested, petitioner was acquitted of that crime. To permit the petitioner to be retried now on the basis of numbers evidence would be to permit further prosecution of the petitioner for the very crime of which he was acquitted.[3]

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[3] Indeed, in its response to the petition for certiorari, the Government concedes:

> "The district court terminated the entire prosecution with respect to petitioner. Although, in light of the arguments the United States made on appeal, the court of appeals did not remand for a second trial on the horse betting portion of the gambling enterprise, there was only a single gambling enterprise, albeit one that could be proved in several ways." Memorandum for the United States, p. 10 (emphasis added).

The importance of this concession cannot be overemphasized, for if "there was only a single gambling enterprise," a second trial of the petitioner would necessarily be for engaging in the same gambling

(cont. on page 15)

Consequently, the Constitution bars such a trial because it would be a plain violation of the prohibition against placing a person twice in jeopardy for "the same offense."[4]

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3 (cont. from page 14)

enterprise, and hence for committing the same crime, as to which he was acquitted in the first trial.

[4] Indeed, to maintain that "the numbers portion" of the indictment somehow survived the judgment of acquittal is to fall into the jaws of an inescapable contradiction. There are only two possibilities: Either the district court was right, and the indictment embraced only horse betting, or the Government was right, and the indictment embraced both horse betting and numbers betting. If the indictment embraced only horse betting, then the numbers evidence was properly excluded, and the Government's appeal had no substantive merit. If, on the other hand, the indictment embraced both numbers betting and horse betting, then the judgment of acquittal necessarily embraced both numbers betting and horse betting, and the "numbers portion" of the indictment could not possibly have survived the acquittal on that indictment. Thus, the more vigorously the Government argues that the district court erred in excluding the numbers evidence because such evidence was encompassed by the indictment, the more plainly it demonstrates that there is no basis for a second trial.

* * *

The argument portion of this brief is divided into three sections.

The first demonstrates that the acquittal entered by the district court was indeed an acquittal in substance as well as form because it was based on the district court's finding that the evidence introduced by the prosecution was insufficient to sustain a conviction. Consequently, the court of appeals lacked appellate jurisdiction under the fundamental rule of double jeopardy jurisprudence which secures the finality of acquittals and insulates them from review. United States v. Martin Linen Supply Co., 97 S.Ct. 1349, 1354 (1977).

The second section shows that a second trial of the petitioner on the basis of numbers evidence is constitutionally barred because it would be for "the same offense" of which he was acquitted. Under the double jeopardy clause, the scope of an acquittal is measured not by the vague notion employed by the court of appeals, "discrete basis of criminal liability," but rather by the concept of "an offense," a concept which

takes its substance from the legislature's definition of the crime in question in the pertinent criminal statute. Here "the offense" of which petitioner was acquitted was the offense of engaging in an illegal gambling business as defined by 18 U.S.C. §1955. Since a second trial of petitioner on the basis of numbers evidence would be a trial for engaging in the same illegal gambling business which was the subject of his first trial, it would be a trial for "the same offense" of which he was acquitted, notwithstanding the difference in proof.

The third section demonstrates that in addition to being constitutionally barred by the double jeopardy clause, the Government's appeal here was also barred because it was not authorized by the Criminal Appeals Act, 18 U.S.C. §3731. The Criminal Appeals Act permits the Government to appeal from a district court decision "dismissing an indictment or information as to any one or more counts." Here the Government concedes that it cannot appeal from the judgment of acquittal insofar as it determines that petitioner cannot be convicted on the basis

of horse betting evidence. At the same time, however, the Government contends that it can appeal from the district court's decision excluding numbers evidence. That decision, however, was not the "dismissal" of an entire count of an indictment. Indeed, it was not a dismissal at all, but rather an evidentiary ruling. And the Criminal Appeals Act expressly indicates that the Government may not appeal evidentiary rulings made, as the one here, after jeopardy has attached.

Argument

I. THE DISTRICT COURT'S JUDGMENT WAS AN ACQUITTAL IN SUBSTANCE AS WELL AS FORM WHICH COULD NOT BE VALIDLY REVIEWED WITHOUT VIOLATING PETITIONER'S RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSE.

The threshold issue in this case is whether the judgment of acquittal entered by the district court was an acquittal for purposes of the double jeopardy clause. If it was, there can be no question that the court of appeals had no jursidiction to hear the Government's appeal. This is because, as this Court recently reaffirmed in United States v. Martin Linen Supply Co., 97 S.Ct. 1349, 1354 (1977):

> "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that "[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution'" (quoting United States v. Ball, 163 U.S. 662, 671 (1896)).

Accord, Fong Foo v. United States, 369 U.S. 141 (1962). See also Kepner v. United States, 195 U.S. 100 (1904); United States v. Sisson, 399 U.S. 267,

289-290 (1970); Serfass v. United States, 420 U.S. 377, 392 (1975).[5]

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[5] In three cases decided in early 1975 -- United States v. Wilson, 420 U.S. 332; United States v. Jenkins, 420 U.S. 358; and Serfass v. United States, 420 U.S. 377 -- this Court formulated a bright line test for determining when the double jeopardy clause bars further prosecution of a defendant. That test provides that when, after a defendant is placed in jeopardy, a trial terminates "in [his] favor," the defendant is shielded from "further proceedings . . . devoted to the resolution of factual issues going to the elements of the offense charged." United States v. Jenkins, 420 U.S. at 365, n. 7, 370 (1975). Thus, the principle that an acquittal bars further prosecution of a defendant is actually a sub-rule -- albeit the most firmly established and essential sub-rule -- of the general standard articulated by Wilson, Jenkins and Serfass. That is to say, an acquittal is one of the ways a trial may terminate "in [a] defendant's favor" following which the Government may neither appeal nor reprosecute. For examples of other ways a trial may terminate following which the Government may neither appeal nor reprosecute, see Finch v. United States, 45 U.S.L.W. 3851 (U.S. 1977)(information dismissed, after consideration of stipulated facts, for failure to state an offense); New York v. Brown, 40 N.Y.2d 381 (1976), cert. denied, 45 U.S.L.W. 3840 (U.S. 1977)(indictment dismissed on ground that crime charged included element regarding which prosecution had introduced no evidence).

The test of whether a ruling is an acquittal from which no appeal may be taken was formulated by this Court in Martin Linen as follows:

> "[W]e must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." 97 S.Ct. at 1354-55.

Under this test, it is plain that petitioner was the beneficiary of just such an unappealable acquittal.

In granting the motion made by petitioner and his codefendants to exclude the evidence of numbers activity, the district court made it very clear that it was not thereby dismissing the indictment or otherwise terminating the prosecution against any one of them. On the contrary, the court stated it was simply

> "grant[ing] the Motion to Strike so much of the evidence in the case as has to do with numbers betting." A. 13.

Indeed, that the indictment retained its legal vitality following this ruling is proved beyond doubt by the fact that

petitioner's ten codefendants were ultimately convicted and sentenced under it.

Thus, it is plain that before the district court could acquit petitioner it had to take a further step. That step was to determine whether there was sufficient evidence of petitioner's involvement in horse betting to permit his case to go to the jury on that ground. The prosecutor argued that there was sufficient evidence. A. 19. The district court, however, in language that can leave no doubt that it was evaluating the evidence and resolving "factual elements of the offense charged," disagreed:

> "You haven't based your charge on Sanabria on anything that he did, only on what somebody else is saying, and in order to do that you have to make a preliminary showing that Sanabria was connected with this operation, and by that I mean a horse operation. I don't think you've done it. The Motion for a Judgment of Acquittal as to Sanabria is allowed." A. 19-20.

Thus, under the test established by Martin Linen, the district court's ruling was clearly an acquittal in substance as well as form, and, therefore, could not

be reviewed "without putting [the petitioner] twice in jeopardy, and thereby violating the Constitution." 97 S.Ct. at 1354.[6]

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[6] Thus, this case is plainly distinguishable from Lee v. United States, 97 S.Ct. 2141 (1977). In Lee, the defendant, after the prosecutor's opening statement, moved to dismiss an information charging him with theft on the ground that it did not allege that the offense was knowingly or intentionally committed. 97 S.Ct. at 2143. The trial court tentatively denied the motion, pending an opportunity to consider the matter more fully, and proceeded to hear the evidence. Id. at 2144. After both sides had rested, the court dismissed the information on its face. Id. Lee was subsequently retried on a valid indictment, and convicted. Id. This Court upheld the conviction over defendant's claim that the second trial was barred by the double jeopardy clause, because it found that the decision terminating the first trial was not a determination that "the defendant simply cannot be convicted of the offense charged." Id. at 2146. On the contrary, the dismissal rested on a ground -- a technical pleading defect in the accusatory instrument -- thoroughly "consistent with reprosecution." Id.

Here, on the other hand, petitioner's trial was terminated not because of a pleading defect in the accusatory instrument, but rather because the evidence was insufficient to sustain a conviction.

(cont. on page 24)

6 (cont. from page 23)

Thus, the decision terminating petitioner's trial was the quintessential example of a ruling that "the defendant simply cannot be convicted of the offense charged," and was utterly inconsistent with any notion of reprosecution. Consequently, far from supporting the Government's position, Lee actually confirms that the Government's appeal here was barred by the double jeopardy clause.

II. THE JUDGMENT OF ACQUITTAL DISCHARGED PETITIONER OF THE CRIME OF ENGAGING IN AN ILLEGAL GAMBLING BUSINESS. FURTHER PROSECUTION ON THE BASIS OF NUMBERS EVIDENCE IS BARRED BECAUSE IT WOULD BE PROSECUTION FOR "THE SAME OFFENSE" OF WHICH PETITIONER WAS ACQUITTED.

A. A retrial of the petitioner on the basis of numbers evidence would be a trial for the same offense of which he was acquitted.

As demonstrated above, there can be no question that petitioner was the beneficiary of an unappealable acquittal. The only remaining constitutional issue is the scope of protection that acquittal afforded.

The double jeopardy clause provides that no person shall be twice placed in jeopardy for "the same offense." This language indicates that the scope of a judgment of acquittal is measured in terms of the "offense" of which it discharges the defendant. Once acquitted of an "offense," the defendant cannot be prosecuted further for "the same offense." Thus, further prosecution of the petitioner here is constitutional only if a

trial of the petitioner on the basis of numbers evidence would not be a trial for "the same offense" of which petitioner has already been acquitted.

What constitutes an offense for double jeopardy purposes is the province of the legislature.[7] Thus, an analysis of when the Constitution bars a prosecution for "the same offense" must begin

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[7] "Because it was designed originally to embody the protection of the common law pleas of former jeopardy, see United States v. Wilson, 420 U.S. 332, 339-340 (1975), the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial." Brown v. Ohio, 45 U.S.L.W. at 4698.

with a close examination of how the legislature has defined the crime in question in the relevant statute.

In particular, the statute must be evaluated to determine whether it was designed to punish a discrete act, or whether it was designed to punish a continuing course of conduct. Common sense notions about the scope of a single crime or criminal transaction are often unreliable. Thus, what appears to be "a single transaction," such as a sale of narcotics (see Gore v. United States, 357 U.S. 386 (1958)), may constitute two or more offenses because it is a violation of two or more separate statutes. Similarly, "a single transaction," such as the robbery of several persons at the same time (see Ashe v. Swenson, 397 U.S. 436 (1970)), may constitute multiple offense because it is a multiple violation of the same statute.[8] On the other hand, what

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[8] But see Justice Brennan's opinion in Ashe, 397 U.S. at 453-454 and n. 7 (1970), arguing that the double jeopardy clause requires the prosecution in one proceeding, except in extremely limited circumstances,

(cont. on page 28)

appear to be numerous distinct transactions, such as the acts embraced by a complex conspiracy (see Braverman v. United States, 317 U.S. 49 (1942)), may constitute but one offense because the statute defines the offense, not as a discrete act, but as a course of conduct.

Here the relevant statute is 18 U.S.C. §1955. Everything about this statute indicates that the crime it was designed to punish is a crime of broad scope. Thus, the statute provides,

> "(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both."

The crime defined by this language is not a discrete act but the whole array of acts embarced in the notion of owning, running or participating in an "illegal gambling business." The broad nature of the

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8 (cont. from page 27)

"of all the charges against a defendant that grow out of a single criminal act, occurrence, episode or transaction." Accord, Brown v. Ohio, 45 U.S.L.W. at 4700 (Brennan, J. and Marshall, J. concurring).

offense is further demonstrated by subparagraph (b)(1) of the statute which defines such an "illegal gambling business" as

> "a gambling business which --
>
> (i) is a violation of the law of a State or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day."

And, perhaps most revealing of all, the legislative history of the statute leaves no doubt Congress's aim was to punish not isolated instances of gambling, but rather gambling activity so "systematic," "continuous" and "substantial" as to be of national concern:

> "The intent of section 1511 and section 1955, below, is not to bring all illegal gambling activity within the control of the Federal Government, but to deal only with illegal gambling activities of major proportions. It is anticipated that

cases in which their standards can be met will ordinarily involve business-type gambling operations of considerably greater magnitude then simply meet the minimum definitions. The provisions of this title do not apply to gambling that is sporadic or of insignificant monetary proportions. It is intended to reach only those persons who prey systematically upon our citizens and whose syndicated operations are so continuous and so substantial as to be of national concern, and those corrupt State and local officials who make it possible for them to function." House Report 91-1549, reproduced in 1970 U.S. Code Cong. and Adm. News, pp. 4007, 4029 (emphasis added).

See also Iannelli v. United States, 420 U.S. 770, 786-791 (1975)(discussing legislative history of 18 U.S.C. §1955).

Because the crime defined by 18 U.S.C. §1955 is a crime of broad scope, the scope of an acquittal under this statute is also necessarily broad. Here the indictment charged the petitioner with engaging in an illegal gambling business in violation of 18 U.S.C. §1955

> "[f]rom on or about June 1, 1971 and continuing up to and including November 13, 1971." Pet. App. 15a.

The district court's judgment of acquittal absolved the petitioner of "the offense charged." Pet. App. 14a. Moreover, the judgment described the offense charged as follows:

> "The defendant having been set to the bar to be tried for the offense of unlawfully engaging in an illegal gambling business, in violation of Title 18, United States Code, Sections 1955 and 2, and the Court having allowed defendant's motion for judgment of acquittal at the close of government's evidence,
>
> It is hereby ORDERED that the defendant Thomas Sanabria be, and hereby is, acquitted of the offense charged . . . ." Pet. App. 14a (emphasis added).

It is, therefore, manifest that any further prosecution of the petitioner under 18 U.S.C. §1955, based on numbers evidence or, for that matter, any other evidence relating to the time period embraced by the indictment,[9] would be for

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[9] Indeed, because the offense defined by 18 U.S.C. §1955 is a continuing offense, petitioner's acquittal bars further prosecution not only for activity strictly within the time period (June 1 to November 13, 1971) embraced by the indictment,

(cont. on page 32)

the same offense of which petitioner was acquitted, and would, therefore, be barred by the double jeopardy clause.

In Brown v. Ohio, 45 U.S.L.W. 4697, 4700 (U.S. 1977), this Court stated:

> "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units."[10]

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9 (cont. from page 31)
but for activity within the penumbra of that time period as well. See In re Nielsen, 131 U.S. 176 (1889)(conviction for unlawful cohabitation with two women from October 15, 1885 to May 13, 1888 barred prosecution for adultery with one of the women on May 14, 1888 because the adultery was included in the continuous crime of unlawful cohabitation); I Anderson, Wharton's Criminal Law and Procedure §145, pp. 351-353 (1957)("Only one prosecution may be had for a continuing crime . . . . A prosecution upon a charge laid at a date prior to a former indictment is barred by a conviction or acquittal upon such former indictment, when the offense charged is a continuing one.").

10 See also I Anderson, Wharton's Criminal Law and Procedure, §145, p. 351 (1957) ("When an offense charged consists of a series of acts extending over a period of

(cont. on page 33)

Similarly, the double jeopardy clause may not be circumvented here by the expedient of dividing the crime defined by 18 U.S.C. §1955 into a series of evidentiary units. Contrary to the holding of the court of appeals, the indictment here did not charge the petitioner with the offense of engaging-in-an-illegal-gambling-business-through-horse-betting. There is no such offense. Nor would a second trial of the petitioner be for the offense of engaging-in-an-illegal-gambling-business-through-numbers-betting, because that offense does not exist either. The offense which Congress has defined is simply the offense of engaging in an illegal gambling business. That is the offense for which petitioner was prosecuted and of which he was acquitted in the district court. It is also the offense for which petitioner would be prosecuted in a second trial on

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10 (cont. from page 32)
time, a conviction or acquittal for a crime based on a portion of that period will bar a prosecution covering the whole period.").

the basis of numbers evidence.[11]

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11 Indeed, this case presents the clearest illustration possible of a projected prosecution of a defendant for the same offense for which he has already been prosecuted, because the statutory crime at issue in both prosecutions -- 18 U.S.C. §1955 -- would be identical. Courts have long held, of course, that the policies of the double jeopardy clause apply not only to offenses which are exactly the same but "embrace closely related or overlapping offenses as well." Comment, Twice in Jeopardy, 75 Yale L.J. 262, 269 (1965). As this Court recently stated in Brown v. Ohio, 45 U.S.L.W. 4697, 4698 (U.S. 1977):

> "It has long been understood that separate statutory crimes need not be identical -- either in constituent elements or actual proof -- in order to be the same within the meaning of the constitutional prohibitions [of the double jeopardy clause]."

The test for determining when a second trial is barred because it is "for the same offense" litigated in a previous trial is stated in Blockburger v. United States, 284 U.S. 299, 304 (1932) as follows:

> "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each

(cont. on page 35)

> There may be a hundred ways -- a hundred distinct units of evidence -- through which the Government could prove the offense at issue in any given case,

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11 (cont. from page 34)

> provision requires proof of a fact which the other does not . . . ."

Accord, Iannelli v. United States, 420 U.S. 770 (1975); Brown v. Ohio, 45 U.S. L.W. at 4699.

Moreover, even where two offenses are sufficiently different to permit the imposition of consecutive sentences under the Blockburger test, successive prosecutions may still be barred "where the second prosecution requires the relitigation of factual issues already resolved in the first." Brown v. Ohio, 45 U.S.L.W. at 4699 n. 6 (citing Ashe v. Swenson, 397 U.S. 436 (1970) and In re Nielsen, 131 U.S. 176 (1889)).

At any rate, the details of the Blockburger test and the holdings of Ashe and Nielsen are not important here, because the present case does not require reference to them. Blockburger, Ashe, and Nielsen all involved situations where the two offenses at issue were not identical. In the present case, however, the two offenses are identical, leaving absolutely no doubt that they are "the same offense" for double jeopardy purposes.

but that hardly entitles the Government to bring a hundred successive trials until it obtains a conviction. On the contrary, it is well established that where a count of an indictment charges an offense that may be established through proof of any of a number of different acts, a conviction or acquittal on that count bars any further prosecution for the offense on the basis of any of the acts. Crain v. United States, 162 U.S. 625, 636 (1896);[12] Hanf v. United States, 235 F.2d 710, 715 (8th

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[12] "We perceive no sound reason why the doing of the prohibited thing, in each and all of the prohibited modes, may not be charged in one count, so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute. And this is a view altogether favorable to an accused, who pleads not guilty to the charge contained in a single count; for a judgment on a general verdict of guilty upon that count will be a bar to any further prosecution in respect of any of the matters embraced by it."

Cir.), cert. denied, 352 U.S. 880 (1956).[13]

B. The indictment was not duplicitous. The district court's ruling on the numbers betting evidence cannot be separated from its ruling on the horse betting evidence.

In attempting to justify its characterization of the indictment as charging two separate and distinct offenses -- (1) a horse betting offense, and (2) a numbers betting offense -- the court of appeals argued that the petitioner

> "could possibly have made a pretrial objection to the indictment as duplicitous. If he had, the probable response of the district court would have been to give the government the option of proceeding on either a numbers theory or a horse betting theory. See 8 Moore's Federal Practice ¶8.04[1]. We can safely

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[13] "The rule against duplicitous pleading is not offended by a count charging more that one act if the acts were part of a transaction constituting a single offense. Certainly, any similar prosecution by the government against this appellant for a violation committed at any time between the dates indicated in Count 1 of the indictment would be a prosectuion for the same offense, and would be promptly dismissed."

> assume that, as to [Sanabria], the government would have opted for the former and that the case would have been tried solely on a numbers theory, a fact which would have required the district court formally to dismiss an entire count of the indictment when it ruled on defendant's motion." Pet. App. 5a, n. 4.

The short answer to this argument is that what motion petitioner "could possibly have made," what the district court's "probable response" would have been, and what one can "safely assume" the Government "would have opted for" have nothing to do with this case. The petitioner's rights must be determined on the basis of what happened, not what could have happened. What happened was that the petitioner was tried on a one-count indictment encompassing both horse betting and numbers betting, and that, after being placed in jeopardy, he was acquitted.

In engaging in speculation about what might have been the case if the indictment had been drawn differently, the court of appeals ignored the fundamental role which the indictment plays in securing to a criminal defendant the protection of the double jeopardy clause. Indeed, one of the

basic criteria for testing the sufficiency of an indictment is whether it describes the offense charged with sufficient precision to enable the defendant to assert the defense of double jeopardy in the event he is later prosecuted for a similar offense. Russell v. United States, 369 U.S. 749, 763-764 (1962). Thus, since it is to the indictment that a court will turn to determine the scope of the offense for which a defendant has been prosecuted, the precise manner in which the indictment has been drafted is of the utmost importance.[14] Here the Government drafted the

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[14] This is especially true where, as here, the criminal statute in question punishes not a narrowly defined, discrete act, but rather a course of conduct which can take numerous forms. Indictments routinely charge such complex crimes by asserting in a single count that the crime was committed in each of the numerous forms encompassed by the statute. And the defendant can be convicted under the count if the prosecution proves that he has committed the crime in any of these forms. But the double jeopardy protection which a defendant receives by virtue of being prosecuted under such a count is commensurate with the full scope of the jeopardy to which he has been subjected.

(cont. on page 40)

indictment against the petitioner as a single-count indictment, and petitioner's rights under the double jeopardy clause must be evaluated on that basis.

The second answer to the argument made by the court of appeals is that the indictment was not duplicitous. Duplicity is defined as "charging multiple offenses in a single count." 8 J. Moore, Federal Practice ¶8.03, p. 8-7 (2d ed., Nov. 1976 revisions). Accord, 1 Wright, Federal Practice and Procedure §142 (1969).

Here the indictment charged petitioner with violating 18 U.S.C. §1955.

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14 (cont. from page 39)

> "Thus, it is recognized that charging in one count the doing of the prohibited act in each of the prohibited modes redounds to the benefit of the accused. A judgment on a verdict of guilty upon that count will be a bar to any further prosecution in respect to any embraced by it." Turf Center, Inc. v. United States, 325 F.2d 793, 796-797 (9th Cir. 1963).

Accord, Crain v. United States, 162 U.S. 625, 636 (1896).

As discussed above, this statute makes it a federal crime to engage in "an illegal gambling business." The indictment accused petitioner and his codefendants with participating in such a business. Only one "illegal gambling business" was charged. For the indictment to have been duplicitous, it would have had to have charged two discrete illegal gambling enterprises.

Read most favorably to the Government, the indictment may have enumerated two types of illegal state betting but this was not for the purpose of charging the existence of two discrete gambling businesses -- and hence two offenses -- but rather for the purpose of describing two types of activity which the single gambling business encompassed. Indeed, as pointed out earlier, the Government explicitly conceded this point in its response to the petition for certiorari:

> "Although, in light of the arguments the United States made on appeal, the court of appeals did not remand for a second trial on the horse betting portion of the gambling enterprise, there was only a single gambling enterprise, albeit one that could be

proved in several ways." Memorandum for the United States, p. 10 (emphasis added).

Consequently, since only one gambling business was alleged, and only one violation of §1955 was charged, the indictment was not duplicitous. Indeed, the situation here is precisely analogous to that in Braverman v. United States, 317 49, 54 (1942) where this Court ruled:

> "The allegation in a single count of a conspiracy to commit several cirmes is not duplicitous, for 'The conspiracy is the crime, and that is one, however diverse its objects'" (quoting Frohwerk v. United States, 249 U.S. 204, 210 (1919)).

So here, the indictment was not duplicitous because the illegal gambling business "is the crime and that is one," however many types of illegal state betting it may encompass.[15]

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15 See also United States v. UCO Oil Co., 546 F.2d 833, 836 (9th Cir. 1976), cert. denied, 97 S.Ct. 1646 (1977)(The defendant challenged as duplicitous counts of an indictment which charged, under 18 U.S.C. §1001, both making a false statement and concealment by trick, scheme or

(cont. on page 43)

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15 (cont. from page 42)

device based on a single document. The court rejected this challenge on the basis, inter alia, that the statute was directed "at a single evil" -- the perversion of the authorized functions of governmental departments and agencies -- and "the enumeration of different kinds of conduct in the statute" reflected "different modes of achieving" the prohibited result, "not separate and distinct offenses."); Driscoll v. United States, 356 F.2d 324, 331-332 (1st Cir. 1966), vacated on other grounds and remanded for further consideration sub nom. Piccioli v. United States, 390 U.S. 202 (1968) (The defendants attacked a count as duplicitous because it charged them with a violation of the wagering tax laws both as principal and as agent, and hence with two offenses. The court found this attack without merit because it found that the gravamen of the offense was "engaging in the business of accepting wagers either as principal or agent." 356 F.2d at 331. Consequently, the court held that the case came within the rule permitting a single count to allege that "the defendant committed the offense . . . by one or more specified means." Id.).

In fact, if the indictment here had been split into two counts charging petitioner with two distinct violations of §1955 -- one based on horse betting, the other based on numbers betting -- the indictment would have been vulnerable to attack as multiplicitous, that is, as charging one offense in two counts. See United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952); Bell v. United States, 349 U.S. 81 (1955); 1 Wright, Federal Practice and Procedure §142 (1969).

III. NO GOVERMENT APPEAL FROM THE DISTRICT COURT'S RULING ON NUMBERS BETTING EVIDENCE WAS AUTHORIZED BY 18 U.S.C. §3731.

As the court of appeals expressly recognized (Pet. App. 4a), the Government may appeal an adverse judgment in a criminal case only when authorized by statute. United States v. Sanges, 144 U.S. 310 (1892). The foregoing sections of this brief have demonstrated that the Government's appeal here was barred by the double jeopardy clause. The appeal was also barred, however, because it was not authorized by the Criminal Appeals Act, 18 U.S.C. §3731.[16]

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[16] Petitioner recognizes that this Court has stated, in dictum, that, in enacting the 1970 amendment to the Criminal Appeals Act, Congress "intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." United States v. Wilson, 420 U.S. 332, 337 (1975). See also United States v. Jenkins, 420 U.S. 358, 363-364 (1975); Serfass v. United States, 420 U.S. 377, 383-387 (1975). But Justice Stevens has persuasively argued that this dictum should not be regarded as controlling. United States v. Martin Linen Supply Co., 97 S.Ct. 1349, 1357-60 (1977) (concurring

(cont. on page 46)

A. The ruling on numbers betting evidence was not a decision "dismissing an indictment . . . as to any one or more counts."[17]

18 U.S.C. §3731 permits the Government to appeal from a district court

16 (cont. from page 47)

opinion). This is especially true where, as here, the questions of statutory construction are significantly different from those presented in Wilson, Jenkins and Serfass. Moreover, even if the dictum were to be followed, a discussion of the issues here in terms of the statute would still be useful because, as demonstrated below, the statutory language itself reflects basic principles of double jeopardy jurisprudence. Thus, even if 18 U.S.C. §3731 does not provide independent, distinctively statutory grounds for barring the Government's appeal, it at least helps to demonstrate why the appeal was barred on constitutional grounds.

17 At the outset, it must be emphasized that the Government's appeal was not authorized by statute simply because 18 U.S.C. §3731 does not authorize a government appeal from an acquittal. But since the general principle has been exhasutively discussed by Justice Stevens in his concurring opinion in United States v. Martin Linen Supply Co., 97 S.Ct. 1349, 1357-60 (1977), and since this brief has already demonstrated that the decision appealed from in this case was indeed an acquittal, there is no need for further discussion of the point here.

decision "dismissing an indictment or information as to any one or more counts." The district court's decision here to exclude the numbers betting evidence was plainly not a "dismissal" of the single-count indictment. Indeed, the irrefutable proof that the decision was not a dismissal of the indictment, is that petitioner's ten codefendants were convicted under the indictment after the decision was made. Nevertheless, the court of appeals ruled that the Government could appeal because the court found that Congress did not use the term "count" as a term of art, but rather as a shorthand expression for "any discrete basis of criminal liability." Thus, the court of appeals read 18 U.S.C. §3731 as permitting the Government to appeal from any decision dismissing "any discrete basis of criminal liability" regardless of whether that "basis of liability" constituted an entire count of an indictment. Pet. App. 5a-7a.

The trouble with this interpretation of the statute is that it totally ignores the central place which the concept of "count" occupies in the structure of double jeopardy jurisprudence. A count

is the fundamental unit of prosecution. The factfinder gives its verdict count-by-count, and the judge renders his sentence count-by-count. Consequently, the nature and scope of a count are very important matters and are very carefully regulated. Indeed, all the rules regulating the sufficiency of an indictment are really rules regulating the sufficiency of a count because the count is the basic unit of the indictment. Thus, the term count has a central and precise meaning in the criminal law based on years of usage and precedent. In contrast, the concept of "discrete basis of criminal liability" employed by the court of appeals has almost no content whatsoever.

The concept of "count" plays a particularly important role in double jeopardy jurisprudence because it is closely related to the concept of "offense." Generally speaking, each count may charge no more nor less than a single offense. And the double jeopardy clause provides that no person may be twice placed in jeopardy for "the same offense." Thus, many of the same principles that are used in regulating the scope of a count --

principles relating to such concepts as duplicity and multiplicity -- are also used in determining whether the double jeopardy clause has been violated. What is more, in determining whether a defendant can be prosecuted for an offense similar to one which has been the subject of a previous trial against him, it is to the relevant count in the initial indictment that the court will turn as primary evidence of the scope of the offense originally prosecuted.

In light of all this, the court of appeals was plainly wrong -- both as a matter of statutory construction and as a matter of constitutional law -- in failing to take the word "count" at face value. One of the primary purposes of the double jeopardy clause is to protect the defendant's legitimate interest in the finality of a decision terminating a prosecution against him. The interpretation proposed by the court of appeals, however, would seriously subvert that interest because it would permit the Government to go behind such decisions in search of "appealable" rulings made during the course of trial that "dismissed" "discrete bases

of criminal liability." Consequently, the interpretation proposed by the court of appeals must be rejected and, once it is, it becomes plain that the Government's appeal here was barred on statutory as well as on constitutional grounds.

B. The ruling on the numbers betting was not a dismissal at all, but rather an evidentiary ruling made after the petitioner was placed in jeopardy.

18 U.S.C. §3731 provides that the Government may appeal from a decision

> "suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information . . ." (emphasis added).

The plain implication of this provision is that the Government may not appeal a decision excluding evidence made after the defendant has been placed in jeopardy. The court of appeals expressly recognized this and also seemed to recognize that, under Fong Foo v. United States, 369 U.S. 141 (1962), the same conclusion is compelled by the double jeopardy clause.

Pet. App. 6a, n. 5. Accord, United States v. Lucido, 517 F.2d 1 (6th Cir. 1975). Nevertheless, the court of appeals held that the Government could appeal here because the petitioner's characterization of the district court's action as an evidentiary ruling was "inaccurate." Id. According to the court of appeals, the district court's "critical ruling" was that "the indictment failed to charge a violation of §1955 on a numbers theory." Id. That the numbers evidence was "subsequently formally excluded" was in the view of the court of appeals "immaterial since the earlier ruling rendered the evidence irrelevant in any case." Id.

The court of appeals' reasoning is strained, to say the least. Petitioner was tried with ten codefendants, all of whom joined in the motion with respect to the numbers evidence. Following the district court's determination of that motion -- which, it should be noted, the court characterized as a "motion to strike" -- the court and counsel for both sides engaged in the laborious process of separating the documentary horse betting evidence from the documentary numbers

evidence so that the latter could be excluded. The case went to the jury on the horse betting evidence, and all of petitioner's codefendants were convicted. In the face of this process, the contention that the district court's action was not "an evidentiary ruling" is simply not tenable.

As for the court of appeals' argument that the district court's ruling was not truly "evidentiary" because it was predicated on a ruling pertaining to the indictment, it need only be pointed out that there are countless times when a trial court is called upon to make a ruling on the relevance of a piece of testimony that requires it to determine the legitimate scope of the indictment. The fact that such rulings require underlying decisions regarding the indictment, however, hardly deprive them of their character as evidentiary rulings. But, under the court of appeals' formula, the Government would have a legitimate claim to appeal each of those rulings. Such a claim would plainly contradict the intent of §3731 and this Court's interpretation of the double jeopardy clause.

Conclusion

The judgment of the court of appeals should be vacated and the case remanded to that court with a direction that the Goverment's appeal be dismissed for lack of appellate jurisdiction, and with a further direction that petitioner not be retried for violating 18 U.S.C. §1955 on the basis of numbers evidence, or, for that matter, on any other basis.

Respectfully submitted,

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Dated: August 11, 1977

No. 76-1040

In the Supreme Court of the United States

OCTOBER TERM, 1977

THOMAS SANABRIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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CITATIONS

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 548 F. 2d 1. The district court did not write an opinion.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1976 (Pet. App. 13a). The petition for a writ of certiorari was filed on January 29, 1977,[1]

[1] The petition was one day out of time under Rule 22(2) of the Rules of this Court.

and was granted on June 27, 1977. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Criminal Appeals Act authorized the United States to appeal in the circumstances of this case.

2. Whether the Double Jeopardy Clause prohibits a second trial after a district court enters a mid-trial order at the defendant's request discharging him because of a supposed defect in the indictment that the defendant did not draw to the court's attention until after jeopardy had attached.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> * * * [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

2. 18 U.S.C. 3731 provides in relevant part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> * * * * *
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

STATEMENT

1. Petitioner and ten co-defendants were tried before a jury in the United States District Court for the District of Massachusetts on a one-count indictment charging that they conducted (Pet. App. 16a)

> an illegal gambling business, to wit, accepting, recording and registering bets and wagers on a parimutual number pool and on the result of a trial and contest of skill, speed, and endurance of beast, said illegal gambling business; (i) was a violation of the laws of the Commonwealth of Massachusetts, to wit, M.G.L.A. Chapter 271, Section 17, in which place said gambling business was being conducted; (ii) involved five and more persons who conducted, financed, managed, supervised, directed and owned all and a part of said business; (iii) had been in substantially continuous operation for a period in excess of thirty days and had a gross revenue of two thousand dollars ($2,000) in any single day; all in violation of Title 18, United States Code, Sections 1955 and 2.

The evidence adduced at trial showed that all defendants were involved in an illegal numbers and horse betting gambling business in Revere, Massachusetts. The operation was broken up when agents of the Federal Bureau of Investigation raided three of the business's locations and seized betting records.

At the close of the government's case on the sixth day of trial, all 11 defendants moved for judgments of acquittal. Counsel for petitioner argued in part that accepting and recording bets and wagers on a parimu-

tuel numbers pool was made a crime not by Mass. Gen. L., ch. 271, Section 17 (1968) (as the indictment had specified) but by Section 7 of that same chapter (A. 5–6). Petitioner had not raised this contention before trial (although pretrial proceedings had consumed three years (Pet. App. 2a)), nor had he raised it earlier during the trial (*id.* at 3a).

The district court denied the motions to acquit, and it also denied a motion to strike evidence pertaining to the numbers pool theory of liability (A. 6–12). The court found that numbers pool betting was prohibited by Section 17 of the state statute.

After one of petitioner's co-defendants presented a witness and another a stipulation, all of the defendants rested. The defendants, including petitioner, renewed their motions for judgments of acquittal, and the district court denied them again (A. 12).

During a brief recess the district court read a state case (*Commonwealth* v. *Boyle,* 346 Mass 1, 189 N.E. 2d 844) that implied that "Section 17 does not include the numbers aspect" of the charge (A. 12–13). On this reasoning the court struck "so much of the evidence in the case as ha[d] to do with numbers betting" (A. 13), but held that the case would be submitted to the jury on the theory that the defendants conducted and operated a business that illegally accepted bets on horse races.

The prosecutor told the court that petitioner had been connected to the business solely through the numbers evidence, and the court then granted petitioner's motion for a judgment of acquittal (A. 16–20). The court recessed the trial so that the parties

could reassess the evidence and arguments in light of its unexpected ruling (A. 20–22).

At the resumption of trial the next day, the prosecutor filed motions requesting the court to reconsider the judgment of acquittal, to reconsider the ruling striking the evidence of the numbers aspect of the business, and to permit the government to amend the indictment (A. 23–36). The motions argued that the mis-citation of the state statute had not prejudiced the defendants, since the indictment fully set out the elements of the offense.

The court expressed concern that petitioner had not raised before trial the issue of the defect in the indictment. The court asked petitioner's counsel to explain how petitioner had been prejudiced by the error. Counsel replied (A. 43), "I don't think I have to allege prejudice." Counsel explained that he had delayed making his motion because it "did not ripen until such time as the Court was asked to take judicial notice of the statute. If the Court had been asked at the beginning of the trial, I planned to raise it then" (A. 44).

Despite counsel's unwillingness to assert prejudice to his client, and despite the admission that counsel had delayed raising an objection to a known defect in the indictment, the district court, stating that it was acting "with considerable reluctance * * * in view of the posture of the case," denied the prosecutor's motions because "the question of identification of the crime charged is such a basic one in the criminal law" (A. 48). The court indicated that its acquittal of peti-

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tioner rested entirely upon its perception that the indictment was defective on its face (A. 48–49).[2]

The court then submitted the case against petitioner's ten co-defendants to the jury solely on the theory that they conducted and operated a gambling business that illegally accepted wagers on horse races. The jury found all ten guilty.[3]

2. The government appealed the disposition of petitioner's case, and the court of appeals reversed. It held that a second trial of petitioner on the numbers aspect of the indictment would not violate the Double Jeopardy Clause because petitioner had requested the termination of the prosecution and had surrendered his valued right to receive the verdict of the jury on the numbers theory of liability. The court of appeals explained (Pet. App. 11a):

> Since [petitioner] voluntarily requested termination of proceedings based upon the numbers activities before there had been any determinations regarding either his conduct or its legal consequences, and since there can be no suggestion that [petitioner's] request was attributable to developments resulting from prosecutorial or judicial overreaching, we hold that there is no double jeopardy bar to a future prosecution on this cause.

[2] It also stated that it would have set aside the judgment of acquittal if it had granted the motion to amend the indictment or to reinstate the evidence (A. 49).

[3] The ten defendants appealed and argued that evidence against them had been based on an illegal wire interception. The court of appeals held that nine of them lacked standing, and it affirmed their convictions. It remanded for a "taint" hearing concerning the tenth defendant. *United States* v. *Plotkin*, 550 F. 2d 693 (C.A. 1).

The court of appeals also held that the Criminal Appeals Act authorizes the United States to appeal in this case. It reasoned that the district court's action "eliminated one basis for imposing criminal liability" (Pet. App. 5a) on respondent, and that Congress intended to permit review of all such decisions once they were embodied in a final order (*id.* at 6a–7a).

Finally, the court concluded that the district court should have allowed the case against petitioner to be submitted to the jury because the mis-citation of the state statute was not prejudicial. Relying upon *United States* v. *Morrison*, 531 F. 2d 1089, 1094 (C.A. 1), certiorari denied, 429 U.S. 837, which had held that the citation of Section 17 rather than Section 7 of the Massachusetts statute does not make a federal indictment insufficient, the court of appeals remanded for a second trial (Pet. App. 4a, 12a). This trial, it ruled, is to be confined to the "numbers" aspect of the charge in light of the prosecution's failure at the first trial to connect petitioner to the horse betting aspect of the gambling operation.[4]

3. This Court granted the petition for a writ of certiorari on June 27, 1977, limited to the first three questions presented. The limited grant of review removes from the case any question concerning the adequacy of the indictment to state an offense, and we therefore proceed on the assumption that the district court erred in terminating the prosecution of petitioner.

[4] The United States did not seek a second trial on the horse betting aspect of the charge.

SUMMARY OF ARGUMENT

I

The Criminal Appeals Act, 18 U.S.C. 3731, authorizes the United States to appeal from any final order in a criminal case. "Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *United States* v. *Wilson,* 420 U.S. 332, 337.

Petitioner was indicted for a federal gambling offense in a single count containing two discrete theories of liability—numbers betting and horse race wagering. Because of what it thought to be a technical deficiency in the indictment, the district court in effect dismissed the portion of the count predicated on the numbers theory; it acquitted petitioner on the horse betting theory, which the prosecution had not proved as to him.

The Criminal Appeals Act, which is to be "liberally construed to effectuate its purposes," permits an appeal that pertains only to a portion of a count when the dismissal of the portion precludes the government from proving the offense under what an appellate court may find to be a valid charge. After all, since every discrete theory of liability could be embodied in a separate count, it is fortuitous (so far as both petitioner and the purposes of the statute are concerned) that both theories may in a particular case have been combined in a single count. If the prosecution could appeal only from dismissals of entire counts, it could simply obtain a separate indictment (charging each

theory in a separate count) and then appeal. That would be a pointless formalism, and the court of appeals therefore correctly held that the statute authorizes appeals that pertain to any discrete theory of liability within a single count. Accord, *United States* v. *Alberti,* C.A. 2, No. 76–1543, decided August 24, 1977.

II

A. The Double Jeopardy Clause forbids a second trial after a defendant has been acquitted on the general issue at the first trial (at least in the absence of a finding of guilt preceding the acquittal). Compare *United States* v. *Martin Linen Supply Co.,* No. 76–120, decided April 4, 1977, with *United States* v. *Sanford,* 429 U.S. 14. But in the absence of a true acquittal, the Court has avoided the creation of any rigid rule that would bar reprosecution. "The determination to allow reprosecution in [some] circumstances reflects the judgment that the defendant's double jeopardy interests, however defined, do not go so far as to compel society to so mobilize its decision-making resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error." *United States* v. *Jorn,* 400 U.S. 470, 484 (plurality opinion).

When, during the course of a trial, an accused willingly surrenders his right to receive a verdict, this choice ordinarily removes any barrier to a second trial. *Lee* v. *United States,* No. 76–5187, decided June 13, 1977; *United States* v. *Dinitz,* 424 U.S. 600. Here petitioner, by persuading the court that the indictment

was defective on its face, willingly surrendered the right to receive the verdict of the jury. This case therefore is controlled by *Lee*.

In both this case and *Lee* the defendant argued, in mid-trial, that the indictment was defective. In both cases the court agreed and terminated the proceedings without resolving any disputed issues of fact or ruling that the defendant could not have been convicted under a proper indictment. Although the court in the present case called the termination an "acquittal," that is not dispositive, since it was, in substance, only a conclusion that the indictment was defective. Substance, not labels, determines the double jeopardy consequences of a court's action.

B. This case is arguably distinguishable from *Lee*, however, because at the same time the district court held that the indictment did not properly charge a gambling offense involving numbers, which is what the prosecution's proof had shown, it also held that the proof was insufficient to show that petitioner participated in a gambling ring involving horse betting. Petitioner contends that because numbers operations and horse betting were simply two aspects of the same gambling offense, the district court has passed upon the general issue and acquitted him.

We agree with petitioner that, in the circumstances of this case, numbers operations and horse betting operations were simply two components of the same offense—operating a gambling business. But each discrete theory of criminal liability could have been

the basis of a separate count of the indictment. If petitioner had been charged in two counts with (1) conducting a horse betting gambling ring, and (2) conducting a numbers betting gambling ring, the proper resolution of this case would be apparent. The district court would have entered two separate judgments, one acquitting petitioner of the horse betting offense and the other dismissing the numbers indictment because it was defective on its face. A second trial of the numbers charge then would have been permitted under *Lee*. Since none of petitioner's legitimate double jeopardy interests are affected by whether the indictment was in one count or two, it follows that *Lee* supports the propriety of a second trial .

Even on the assumption that a two-count indictment would have been improper, a second trial still is permissible because petitioner rather than the prosecutor was responsible for "splitting" the charge into two components. Petitioner persuaded the district court that the single count failed effectively to charge both the horse betting and numbers theories of liability and that the indictment charged one but not the other. He persuaded the district court, in other words, to treat the case as if there were two separate charges, and to dismiss the numbers charge on a ground unrelated to his guilt or innocence. The prosecutor attempted to obtain a final resolution on all theories at the same trial, but petitioner resisted, and "his action deprived him of any right that he might have had against consecutive trials" (*Jeffers* v.

United States, No. 75–1805, decided June 16, 1977, plurality slip op. 16).

C. Petitioner's failure to raise his objection to the indictment before trial provides an additional reason to conclude that the Double Jeopardy Clause does not bar a second trial. Only petitioner's delay in presenting to the district court a known "defect" in the indictment is responsible for the need to hold two trials here. Petitioner easily could have pointed out the statutory mis-citation before trial, and the prosecutor then either could have obtained an amended indictment or argued (as the court of appeals held was correct that the mis-citation was immaterial. Alternatively, an adverse ruling by the district court could have been appealed and the matter resolved in that fashion before petitioner was ever placed in jeopardy. Either way, any problem could have been corrected before trial.

The attachment of jeopardy before resolution of petitioner's objections to the indictment was unnecessary. We submit that the Double Jeopardy Clause does not bar a second trial when the defendant subjects himself to an unnecessary jeopardy. There is no reason why a clever defendant should be allowed to transmute a drafting error (or his ability to persuade a district court that there is a drafting error) into immunity from prosecution merely by delay in calling the problem to the court's attention. The Double Jeopardy Clause is designed to protect defendants from repetitious prosecutions sought by the govern-

ment; it is not intended to give the defendant a chance to subject himself to an unnecessary jeopardy as part of a stratagem to avoid prosecution altogether. A defendant has no legitimate reason to keep the knowledge of a defect in an indictment to himself until after jeopardy has attached, and the fact that he subjects himself to an unnecessary jeopardy by doing so therefore should not give rise to a double jeopardy objection to a second trial on a proper charge.[5]

ARGUMENT

I

THE CRIMINAL APPEALS ACT AUTHORIZES A PROSECUTION APPEAL FROM ANY FINAL ADVERSE ORDER ENTERED IN A CRIMINAL CASE, SO LONG AS THE DOUBLE JEOPARDY CLAUSE DOES NOT FORECLOSE FURTHER PROCEEDINGS

The first question in any appeal by the United States is whether that appeal is authorized by statute. *United States* v. *Wilson,* 420 U.S. 332, 336. Petitioner contends that the appeal in the present case was not authorized by the Criminal Appeals Act, 18 U.S.C. 3731. This is so, petitioner maintains, because the district court's ruling was essentially an evidentiary ruling and also because the statute does not authorize an appeal from the dismissal of part of a count of an indictment.

These arguments do not take adequate account of Congress's purposes in enacting the Criminal Appeals

[5] The injury to the ends of public justice from sustaining a double jeopardy claim in such circumstances is particularly grievous when—as in this case but unlike *Lee*—the defendant's attack on the indictment is in fact not meritorious.

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Act. "Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *United States* v. *Wilson, supra,* 420 U.S. at 337; *United States* v. *Martin Linen Supply Co.,* No. 76–120, decided April 4, 1977, slip op. 4.

Because the Criminal Appeals Act must be "liberally construed to effectuate its purposes" (18 U.S.C. 3731, 5th para.), it is not dispositive that the Act speaks of the dismissal of "one or more counts" of an indictment, while the dismissal here arguably affected only a portion of one count. The dismissal was final, and it extinguished the prosecution unless reversed on appeal.[6] The order was not interlocutory or tentative; it left nothing to be litigated between the parties. Petitioner's view would exalt form over substance, but, as the Court explained in *Martin Linen, supra,* slip op. 3 n. 4, "it is now established that the form of the ruling is not dispositive of appealability in a statutory sense." The statute's reference to a "count" of an indictment should be construed to encompass any discrete theory of liability upon which a conviction may be founded.[7]

For the reasons we discuss at pages 31–34, *infra* the prosecutor could have charged petitioner in two counts, one alleging a violation of 18 U.S.C. 1955 by conducting a numbers operation and the other alleg-

[6] Or unless a new indictment were returned.

[7] The only court other than the court below that has considered this question has held that the United States may appeal an order dismissing part of a count of an indictment. *United States* v. *Alberti,* C.A. 2, No. 76–1543, decided August 24, 1977, slip op. 5509–5511.

ing a violation of that statute by conducting a horse betting operation.[8] Since any discrete theory of criminal liability could be embodied in a separate count, it is a mere fortuity, so far as both petitioner and the purposes of the Criminal Appeals Act are concerned, whether they are so charged. There is no reason why Congress would have authorized an appeal when the prosecutor elected to use separate counts for each theory and forbidden an appeal when he made the contrary election; the interests of the defendant are the same in either event, and the appropriateness of appellate review of legal decisions is not affected by the form of the charge. We therefore agree with the court of appeals' treatment of petitioner's argument (Pet. App. 6a–7a):

> The sole practical effect of [petitioner's] narrow construction of § 3731 would be that, in such cases only, the government would be obliged to reindict the criminal defendant before attempting to reprosecute. There is no indication, either in the statute or its legislative history, that the use of the word "count" was intended either to limit the instances in which the government could appeal or to force the government, in certain instances, to reindict

[8] This does not mean, however, that the indictment actually drafted was duplicitous. See *United States* v. *Santarpio,* C.A. 1, No. 76–1178, decided June 30, 1977, slip op. 4 n. 1. An indictment may charge the commission of the same crime (here operation of a gambling ring) by different means. The indictment also could use a separate count for each means, however, and the charges would simply merge upon conviction. *Prince* v. *United States,* 352 U.S. 322; *United States* v. *Universal C.I.T. Credit Corp.,* 344 U.S. 218, 225; *Dealy* v. *United States,* 152 U.S. 539.

the criminal defendant before it could attempt to proceed against him anew. On the contrary, the legislative history indicates that Congress intended to remove all statutory barriers to government appeals and permit appeals from an unfavorable termination of a criminal charge whenever the double jeopardy clause does not prohibit further proceedings. See *United States* v. *Wilson*, 420 U.S. 332, 337–39 (1975). Noting also that the last sentence in § 3731 provides that it is to be "liberally construed to effectuate its purposes", we interpret the word "count" in the statute to refer to any discrete basis for the imposition of criminal liability that is contained in the indictment. Here, the district court effectively dismissed the portion of the indictment charging a § 1955 violation based on the defendant's alleged numbering activities. Under our construction of § 3731, therefore, this order is appealable if the double jeopardy clause does not bar a future prosecution on this charge.

Petitioner's further argument (Br. 50–52) that the order in the present case was an evidentiary ruling that cannot be appealed misses the point of the district court's decision. The court ruled that the indictment was defective on its face; it did not purport to decide whether particular evidence was "admissible" in the usual sense.[9]

[9] The error of petitioner's argument would be plain if the district court, before trial, had struck from the indictment all references to numbers betting. Such a ruling would bear only on the adequacy of the charge and would be immediately appealable (see *United States* v. *Alberti*, *supra*).

Petitioner's argument would be weightier if the United States had sought to appeal during trial, in violation of the restriction contained in the second paragraph of the Criminal Appeals Act, from the order excluding evidence that followed the district court's holding that the indictment was defective. But the United States did not take such an appeal. It appealed only from the order terminating the prosecution on the numbers theory, and that appeal is authorized by the first paragraph of the statute whether or not an appeal would have been authorized by the second paragraph.[10] The appeal is authorized because the district court's "acquittal" terminated the proceedings short of conviction, and the first paragraph, as interpreted in *Wilson* and *Martin Linen*, authorizes an appeal from any order terminating the prosecution unless the Double Jeopardy Clause bars the way.[11] We

[10] The second paragraph of the Criminal Appeals Act does not authorize appeals from evidentiary orders entered after the attachment of jeopardy and prior to verdict. But that paragraph deals only with interlocutory appeals, and the purpose of the limitation was to prevent the interruption of an ongoing trial by an interlocutory appeal. Once the trial has ended in a final judgment an appeal may be taken under the first paragraph of the Act, and the limitations on the right to appeal conferred by the second paragraph become unimportant. See also Pet. App. 6a n.5.

[11] Mr. Justice Stevens, concurring in the judgment in *Martin Linen*, contended that Congress did not authorize appeals from "acquittals." Although the Court in *Martin Linen* rejected this argument, it would not in any event apply to an appeal in the present case. The district court's order terminating the prosecution was based on a perceived defect in the indictment. For the reasons we discuss at pages 25–29, *infra*, the district court's order, although called an "acquittal," was not an acquittal but an order dismissing the indictment. The legislative history of the Criminal

therefore turn to a consideration of petitioner's double jeopardy arguments.

II

THE DOUBLE JEOPARDY CLAUSE DOES NOT FORBID A SECOND TRIAL OF PETITIONER FOR CONDUCTING AN ILLEGAL NUMBERS GAMBLING BUSINESS

Petitioner contended in the district court that the indictment was insufficient to charge him with conducting a gambling business that ran a numbers pool. The district court accepted this theory. It then "acquitted" petitioner because the evidence did not show that he had conducted a gambling business in any other way.

By persuading the court to accept his erroneous [12] contention that the indictment did not suffice to charge him with a gambling offense involving numbers, petitioner avoided any determination of the issue whether he was guilty of that offense. He contended at trial, in other words, that he never had been

Appeals Act indicates that Congress intended to authorize appeals in cases like the present one. See S. Rep. No. 91-1296, 91st Cong., 2d Sess. 7, 8–12 (1970).

[12] See page 7, *supra*. The indictment was flawed because it did not cite the correct portion of the Massachusetts statute. But this mis-citation did not hinder petitioner's defense, since the indictment charged all of the elements of the offense and, in particular, stated that petitioner had accepted and registered bets "on a parimutual number pool" (Pet. App. 16a). Because the failure to cite the correct section of a statute is not a reason to dismiss an indictment in the absence of prejudice, the mis-citation was not a fatal flaw. Fed. R. Crim. P. 7(c)(3); *Hagner* v. *United States*, 285 U.S. 427, 431.

charged with conducting a numbers gambling operation and so should not be adjudged guilty or innocent of such a crime.

Petitioner's argument has "shifted its focus, in a way not uncommon to lawsuits" (*Codd* v. *Velger*, 429 U.S. 624, 624), since the district court ruled in his favor. Petitioner now relies on the fact that, contrary to his contention to the district court, the indictment charged the operation of a gambling business involving numbers. Because the indictment charged that crime, he maintains, he may not be retried after his "acquittal" at trial (Br. 38).

There is considerable tension between petitioner's argument at trial that he was not charged with a numbers offense and his argument here that he was not only charged with but "acquitted" of that crime. But however that may be, the decisive answer to petitioner's position is that he was not "acquitted" at all. The district court simply dismissed the indictment, at his behest, on a motion filed after jeopardy had attached. This case therefore is controlled by *Lee* v. *United States*, No. 76-5187, decided June 13, 1977, and petitioner may be tried a second time without violating the Double Jeopardy Clause.

A. THE DOUBLE JEOPARDY CLAUSE ERECTS AN ABSOLUTE BAR TO A SECOND PROSECUTION ONLY IF THE FIRST ENDS IN AN ACQUITTAL

The Double Jeopardy Clause "protects against a second prosecution for the same offense after acquit-

tal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina* v. *Pearce,* 395 U.S. 711, 717. Petitioner's first trial was aborted, at his request, before a verdict of guilt or innocence was rendered by the jury. This case therefore does not present any question concerning a second prosecution after a conviction or an acquittal by the factfinder. It does, however, present the question whether petitioner may be tried a second time for the same crime.

The prohibition against multiple trials for the same offense is based upon the special interests protected by the Clause:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. *United States,* 355 U.S. 184, 187–188, quoted in *Serfass* v. *United States,* 420 U.S. 377, 387–388. See also *Breed* v. *Jones,* 421 U.S. 519; *United States* v. *Jorn,* 400 U.S. 470, 479 (plurality opinion).

Because of the special rules of finality created by the Clause, the prosecution may not retry a defendant

who has been acquitted at trial, whether or not the instructions or legal principles underlying the acquittal were erroneous. *Lee* v. *United States, supra,* slip op. 7; *Finch* v. *United States,* No. 76–1206, decided June 29, 1977; *Kepner* v. *United States,* 195 U.S. 100. But only a "verdict of acquittal at the hands of the jury [or the judge in a bench trial]" (*Forman* v. *United States,* 361 U.S. 416, 426) is an absolute bar to a second trial.[13] In any other event, whether a second trial may be held depends upon a careful balancing of the defendant's interest in avoiding repetitious trials against the public's interest in "fair trials designed to end in just judgments." *Wade* v. *Hunter,* 336 U.S. 684, 689.

With the exception of the principle that a true acquittal (not preceded by a finding of guilt) is a complete bar to reprosecution, the Court has eschewed the application of any "mechanical formula" or "rigid rules." *Illinois* v. *Somerville,* 410 U.S. 458, 462–467. A rule that a second trial for the same offense invariably violates the Double Jeopardy Clause "would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. * * * [T]he purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying

[13] A judgment of acquittal authorized by the applicable rules and not preceded by a finding of guilt also may bar a second trial. Compare *United States* v. *Martin Linen Supply Co., supra,* with *United States* v. *Sanford,* 429 U.S. 14.

courts power to put the defendant to trial again." *Wade* v. *Hunter, supra,* 336 U.S. at 688–689. As Mr. Justice Harlan explained in *United States* v. *Jorn, supra,* 400 U.S. at 483–484, "it is clear beyond question that the Double Jeopardy Clause does not guarantee a defendant that the Government will be prepared, in all circumstances, to vindicate the social interest in law enforcement through the vehicle of a single proceeding for a given offense. * * * The determination to allow reprosecution in [some] circumstances reflects the judgment that the defendant's double jeopardy interests, however defined, do not go so far as to compel society to so mobilize its decision-making resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error."

The most important value that may be disserved by a mid-trial termination is the right of the accused "to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *United States* v. *Jorn, supra,* 400 U.S. at 486. But when, during the course of a trial, an accused willingly surrenders his right to receive the verdict of the factfinder, this choice removes any barrier to a second trial, unless the election was forced by judicial or prosecutorial overreaching. *Lee* v. *United States, supra; United States* v. *Dinitz,* 424 U.S. 600. *Lee* recognized that it makes no difference whether the trial judge calls the termination a mistrial or a dismissal of the indictment, and it should

similarly make no difference whether he calls it an "acquittal."

These principles of double jeopardy law support the propriety of a second trial of petitioner. He willingly surrendered his right to receive the verdict of the jury and persuaded the judge to enter an erroneous decision, based upon a mistake of law, on a technicality of pleading, wholly unrelated to the determination of guilt or innocence. If the trial had gone to verdict, there would have been no need to hold a second trial. Petitioner's choice, and his alone, is responsible for the need to hold additional proceedings in this case.

B. PETITIONER'S MID-TRIAL OBJECTION TO THE SUFFICIENCY OF THE INDICTMENT REMOVED ANY DOUBLE JEOPARDY BAR TO A SECOND TRIAL

Lee v. *United States, supra,* held that a defendant could be tried a second time after the district court dismissed the information in mid-trial in response to the defendant's argument that it failed to state an offense. *Lee* controls this case. Here, as in *Lee,* petitioner objected to the indictment on the ground that it was defective on its face. Here, as in *Lee,* petitioner persisted in his contention even though the granting of his motion prevented the return of a verdict by the factfinder. He abandoned his right " 'to go to the first jury and, perhaps, end the dispute then and there with an acquittal.' " *Dinitz, supra,* 424 U.S. at 608. Here, as in *Lee,* the fact that petitioner has not received the verdict of the factfinder is entirely a matter of petitioner's choice. Since petitioner "exercised his choice in favor of terminating the trial" (*Lee, supra,*

slip op. 9) rather than receiving the jury's verdict, he may be tried a second time now that the court of appeals has determined that petitioner was not entitled to the termination he sought and received.

There are several differences between this case and *Lee,* but in our view none of them supports a different outcome. For example, in *Lee* the charge was indeed defective, and the judge properly granted the motion to dismiss. In the present case, by contrast, there was no error at all and thus no reason to terminate the trial without submitting the case to the jury. But it would be a topsy-turvy rule that rewarded defendants with immunity from further prosecution for leading district judges into error, while subjecting to second trials defendants whose first trial was infected with an error that made dismissal appropriate. The need to try petitioner again is entirely of his own invention. If the government could retry Lee despite its negligence in drawing the original defective charge, then surely it should be permitted to retry petitioner on what always has been a sufficient charge.

Petitioner argues, however, that this case is different from *Lee* because the district judge "acquitted" him. We agree with petitioner that, under *United States* v. *Martin Linen Supply Co., supra,* if the district court acquitted him of the charge on which the United States seeks to retry him, retrial would be barred. But we do not agree with petitioner that he was acquitted, as this Court has used that term.

Petitioner's argument that he was acquitted has two parts. First, petitioner argues that the district

judge did not contemplate reprosecution (Br. 23–24 n. 6). More broadly, petitioner contends that the finding that there was no evidence to support petitioner's involvement in horse betting constituted an acquittal on the entire gambling offense (Br. 25–44). We take up these arguments in turn.

1. The district court's description of its decision as an "acquittal" is not decisive

The district court stated that it was "acquitting" petitioner. Its characterization of its decision is not, however, the last word. "The word [acquittal] has no talismanic quality for purposes of the Double Jeopardy Clause." *Serfass* v. *United States, supra,* 420 U.S. at 392. This Court always has examined the substance rather than the label of a district court's decision, and "the trial judge's characterization of his own action cannot control the classification of the action for purposes" of double jeopardy analysis. *United States* v. *Jorn, supra,* 400 U.S. at 478 n. 7. See also *United States* v. *Sisson,* 399 U.S. 267, 270, 286–287.

The Court explained in *United States* v. *Martin Linen Supply Co., supra,* slip op. 7, that "what constitutes an 'acquittal' is not to be controlled by the form of the judge's action." For the purposes of the Double Jeopardy Clause, an "acquittal" is a ruling resolving factual issues. "[A] trial court's ruling in favor of the defendant is an acquittal *only if* it 'actually represents a resolution, correct or not, of some or all of the factual elements of the offense

charged.' " *Lee* v. *United States, supra,* slip op. 6 n. 8, quoting from *United States* v. *Martin Linen Supply Co., supra,* slip op. 7 (emphasis added).

Under this standard, the district court's decision did not acquit petitioner. The court did not purport to pass upon the sufficiency of the evidence to demonstrate that petitioner had engaged in a gambling enterprise that accepted numbers bets. The district court's ruling—here, as in *Lee*—was that the indictment did not sufficiently charge the defendant with engaging in the conduct to which the evidence had been addressed. The "acquittal" here thus was equivalent to the "dismissal" in *Lee;* each was the consequence solely of the court's conclusion that the charge was defective. The district court itself said that its decision was "entered on legal grounds as opposed to containing or importing a finding of fact" (A. 49), and the court of appeals therefore properly held that "[n]either the judge nor the jury ever focused on what the evidence of numbering activities established regarding [petitioner's] conduct or on whether the alleged conduct was such that criminal liability could be imposed. Because of this fact, a future prosecution in this case will not threaten one of the principal private interests protected by the clause: the criminal defendant's interest in preserving a district court's ruling that he is not criminally responsible" (Pet. App. 8a–9a).

Petitioner responds that the district court terminated the prosecution with the expectation that it could not be reinstituted, and that this itself bars

future prosecution. This contention is not factually correct. The district court did not state or imply that further proceedings on a corrected indictment would be barred. The record is silent with respect to the court's intentions, and petitioner's argument therefore is unfounded.

In any event, there would be no reason to give controlling significance to the district judge's subjective intentions, which do not affect in any way the defendant's interests. To give conclusive force to the judge's subjective intentions would be, in effect, to give conclusive force to the label the judge attaches to his action, since the use of the label "acquittal" may simply manifest the judge's subjective conclusion that further prosecution would be barred.[14] This Court has held, however, that labels have no such dispositive significance.

Here, as in *Lee,* the termination "clearly was not predicated on any judgment that [petitioner] could never be prosecuted or convicted for the [gambling offense involving numbers]. To the contrary, the District Court stressed that the only obstacle to a convic-

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[14] It would have made no difference in *Lee*, for example, if the district judge, acting under a misapprehension that the Double Jeopardy Clause would bar further prosecution, had "acquitted" Lee or dismissed the indictment with prejudice. It would be pointless to let such assessments become self-fulfilling prophesies. The interests of the defendant in avoiding a second trial are the same whatever the judge may suppose the consequences of his decision to be, and his beliefs therefore should not affect the constitutional rules governing reprosecution. Cf. *Lee*, *supra*, slip op. 7–8 n.9.

tion was the fact that the [indictment] had been drawn improperly.[15] The error, like any prosecutorial or judicial error that necessitates a mistrial, was one that could be avoided—absent any double jeopardy bar—by beginning anew the prosecution of the defendant." *Lee, supra,* slip op. 7. The district court indicated that if the indictment had been drafted correctly the case could have proceeded; the situations in *Lee* and the present case therefore are identical.[16] The district court did not express any view

[15] In *Lee* the district judge had stated his conviction that the defendant was guilty. See slip op. 3. In the present case the district judge rejected out of hand the argument of petitioner and his co-defendants that the evidence was insufficient to allow the case to go to the jury. See A. 4: "I don't think there is any question that there is sufficient evidence to go to the jury. Do you seriously want to argue that now?" When the court later particularly evaluated the evidence pertaining to petitioner, it did not state that there was any lack of proof to connect petitioner to numbers operations; to the contrary, the court stated (A. 49) that it would have reinstated the charges against petitioner if it had accepted the prosecutor's argument that the indictment was sufficient.

[16] Petitioner relies (Br. 27–28, 35) on *Ashe* v. *Swensen*, 397 U.S. 436. But this reliance is unwarranted. Indeed, the approach we take here is similar to the approach this Court took in *Ashe* to the problem of ascertaining what issues had been decided in a prior prosecution and therefore could not be relitigated under the principles of collateral estoppel. The Court held (397 U.S. at 444) that a court must examine the record of the first trial to see what issues had necessarily been decided; if a " 'rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration' " (*ibid.*), collateral estoppel does not apply. See also *United States* v. *Adams*, 281 U.S. 202. In the present case the only issue necessarily decided was whether the evidence was sufficient to connect petitioner to horse betting activities. The district court expressed no opinion concerning the proof of numbers betting (although it denied petitioner's

that—apart from the constraints of the Double Jeopardy Clause—further prosecution of petitioner could not succeed.[17] The defect identified by the district court was an error in drafting the indictment, and the defect could have been cured by a second draft; the district court did not express any opinion on the general issue of guilt or innocence. The district court therefore has not granted a "midtrial dismissal * * * on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged" (*ibid.*), and the Double Jeopardy Clause does not interdict further proceedings.[18]

motion for acquittal on evidentiary grounds (A. 4, 7, 12)). It did not resolve the general issue of guilt or innocence because petitioner had convinced the district court that the indictment did not charge any offense having to do with numbers. That issue therefore remains open for future proceedings.

[17] In our view it would not have mattered even if the district judge had been of the opinion that no prosecution could have succeeded, so long as the judge did not base that opinion on a resolution of the general issue of guilt or innocence. See our supplemental memorandum in *United States* v. *Scott*, petition for a writ of certiorari pending, No. 76–1382. It is unnecessary to reach that question here, however, because the district court did not find that, apart from the Double Jeopardy Clause, no prosecution of petitioner could be successful. (We are sending a copy of our supplemental memorandum in *Scott* to counsel for petitioner.)

[18] Two courts of appeals (in addition to the First Circuit here) have held that the Double Jeopardy Clause does not bar a second trial after an indictment is dismissed in mid-trial, even if the district judge thought the defect to be incurable. See *United States* v. *Appawoo*, 553 F. 2d 1242 (C.A. 10) (district court erroneously thought statute unconstitutional); *United States* v. *Kehoe*, 516 F. 2d 78 (C.A. 5), certiorari denied, 424 U.S. 909 (prosecution commenced under incorrect statute). These cases strongly support the position we have taken in the text.

2. The joinder of two theories of criminal liability in a single count does not make an acquittal on one theory an acquittal on both

Petitioner's major argument, which he presents in several ways, is that because he was charged in a single-count indictment with conducting but a single gambling enterprise, the district court's conclusion that he had not been tied to horse betting necessarily absolved him of criminal responsibility for that single offense, even though the district court did not address the sufficiency of the numbers evidence. It would be improper, petitioner argues, to allow the single count to be split into two theories of liability.

We disagree with this analysis. In our view, the *Lee* test should be applied separately to each independent basis of criminal responsibility. It was fortuitious, from petitioner's point of view, that he was charged in one count rather than two. If he had been charged in two counts with (1) operating a horse betting gambling ring, and (2) operating a numbers gambling ring, the proper resolution of this case would be apparent. The district court would have entered two separate judgments. It would have acquitted petitioner on the horse betting charge for failure of proof, and it would have dismissed the numbers charge because of the perceived defect on the face of the indictment. A second trial on the numbers charge would have been permitted under *Lee,* because petitioner asked the court to dismiss the numbers charge.

Petitioner's interests in avoiding that second trial are the same whether the initial charge was in one count or two. In either event petitioner exercised his choice in favor of terminating the trial; in either event the rationale of *Lee* and *Dinitz* permits reprosecution after the defendant has made such a choice to surrender his valued right to receive the verdict of the jury, and neither it nor the court has passed on the general issue of guilt or innocence.

We believe, therefore, that the propriety of a second trial in this case follows directly from *Lee* if we can establish that it would have been proper to charge petitioner in two counts rather than one. Alternatively, we submit that even if a two-count charge would have been improper, petitioner himself "split" the charge by inducing the district court to rule, over the prosecution's objection, that the indictment did not charge any numbers offense. A second trial therefore is proper under the approach adopted by the plurality opinion in *Jeffers* v. *United States,* No. 75–1805, decided June 16, 1977.

a. Petitioner could have been charged in a two-count indictment, each presenting a discrete theory of criminal liability

We agree with petitioner that Congress intended in 18 U.S.C. 1955 to authorize only a single punishment for conducting a single gambling enterprise, no matter how many state statutes the enterprise violated and no matter how many types of bets it took. The taking of numbers bets and the taking of bets on horse races were in the circumstances of this case

simply two ways to commit the same federal crime,"[19] and it was proper under Fed. R. Crim. P. 7(c)(1) to allege both in the same count of the indictment. Proof of either horse betting or numbers betting would have been sufficient to make out the commission of the gambling offense.

It does not follow, however, that it would have been improper to charge petitioner in two counts rather than one.

> [A] draftsman of an indictment may charge crime in a variety of forms to avoid fatal variance of the evidence. He may cast the indictment in several counts whether the body of facts upon which the indictment is based gives rise to only one criminal offense or to more than one. * * * [B]y an indictment of multiple counts the prosecutor gives the necessary notice and does not do the less so because at the conclusion of the Government's case the defendant may insist that all the counts are merely variants of a single offense.

United States v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 225. In other words, a prosecutor may charge a single offense in a variety of counts because it is difficult to predict which theory of liability the

[19] A more difficult question would be presented if the evidence established two different gambling enterprises (say, one running a casino and the other a numbers lottery) with some but not all venturers in common. Since the statute provides separate punishment for each gambling enterprise, it is possible to have multiple liability for conducting multiple enterprises. But the prosecution did not contend, and the indictment did not charge, that there was more than one enterprise in this case.

facts will support, because each theory of liability may raise distinct legal problems (as they did in the instant case), because separation may make the case more easily understood, or for any of a number of reasons. See also, *e.g.*, *United States* v. *Gaddis*, 424 U.S. 544, 550 (prosecutor may simultaneously charge violations of 18 U.S.C. 2113(a), (b), (c) and (d) even though only one conviction could be entered); *Pierce* v. *United States*, 160 U.S. 355 (defendant may be charged in two counts with the same murder, one count alleging use of a gun and the other the use of a blunt instrument); *Dealy* v. *United States*, 152 U.S. 539 (defendant may be charged in 17 counts with the same conspiracy, each count alleging a different overt act).

Since the prosecutor, without violating any of petitioner's rights, could have charged him in two counts with conducting the same gambling business by two different means, there would be no constitutional objection to a conviction on one of those counts just because there had been an acquittal on the other. The prosecutor would have had to present both counts for resolution in a single trial, since they stated the same offense (see *Brown* v. *Ohio*, No. 75–6933, decided June 16, 1977), but a jury would have been free to convict of one and acquit of the other. The facts may show (as they did here) that petitioner engaged in numbers betting but not horse betting.[20] Similarly, if petitioner had moved for a mis-

[20] Although a conviction on one count would bar further prosecution on the other, an acquittal would not necessarily do so, because the counts "merge" only upon conviction.

trial with respect to the numbers betting theory but had asked to submit the horse betting theory to the jury, and the judge had granted his request, he could not later argue that the jury's acquittal on the horse betting charge would block further prosecution on the theory of liability that had been removed from the case at his own request.

Because, as *Lee* establishes, a motion to dismiss the indictment on account of facial defects is the constitutional equivalent of a motion for a mistrial, it follows that this case must receive the same constitutional treatment as the examples we have just discussed.[21] Petitioner removed the numbers theory from the case on his own motion before the court acquitted him on the horse betting theory of liability. He was not acquitted on the numbers theory.

b. Petitioner is responsible for "splitting" the charge into two theories of liability

Even on the assumption that a two-count indictment would have been improper, we believe that this case should be treated as if the charges had been expressed in two counts. Petitioner, not the prosecutor, was responsible for "splitting" the charge into two discrete bases of criminal liability.

In *Jeffers* v. *United States, supra,* the defendant was charged with conspiring to violate the narcotics laws, in violation of 21 U.S.C. 846, and with conducting a continuing criminal enterprise, in violation of 21 U.S.C. 848. This Court concluded that the conspir-

[21] See note 16, *supra.*

acy was a lesser included offense of the continuing criminal enterprise and, consequently (under the reasoning of *Brown* v. *Ohio, supra*), that the two were the "same offense." It therefore assumed that they should have been prosecuted simultaneously and that the Double Jeopardy Clause ordinarily would bar successive trials. But Mr. Justice Blackmun's opinion for a plurality of the Court held that this principle did not assist Jeffers, who had opposed the holding of a joint trial. He explained (slip op. 14, footnote omitted) that "although a defendant is normally entitled to have charges on [the same] offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two [charges] tried separately and persuades the trial court to honor his election."

Petitioner made such an election here. The indictment charged the existence of a single gambling offense, carried out by horse betting and by numbers betting. Petitioner persuaded the district judge, however, that there was a difference between these theories of liability and that the indictment was adequate to charge horse betting but not numbers betting. He persuaded the district court, in other words, to treat the two theories of liability as distinct offenses. He then persuaded the court to disregard the numbers theory (on a ground not related to guilt or innocence) and to acquit him on the horse betting theory. This effectively carved up the charge; petitioner obtained an acquittal on one theory of liability and what amounted to a dismissal of the indictment on the other.

The prosecutor attempted to bring all of the theories of liability on the "same offense" to trial at the same time. As in *Jeffers,* an objection interposed by the defendant frustrated a final resolution of all theories of liability at the same trial. Indeed, in at least one respect the case for a second trial of petitioner is stronger than the case for a second trial of Jeffers; in *Jeffers* the prosecutor still could have given the defendant a unified trial by severing the cases of his co-defendants (see slip op. 1 n. 3; Stevens, J., dissenting), whereas in the present case the prosecutor joined all theories of liability in a single charge, and petitioner created the occasion for a second trial by reserving his objections to the indictment until after jeopardy had attached.[22] Since petitioner did not present his objection before trial, and since at trial he insisted, erroneously, that the numbers betting theory of liability was not properly before the court, "his action deprived him of any right that he might have had against consecutive trials" (*Jeffers* plurality slip op. 16). So long as the defendant is responsible for the separation of the distinct theories of liability underlying the "same offense," he has no valid complaint when his election results in the need for another trial to resolve the issue of his guilt or innocence to the entire charge.

c. A defendant who neglects opportunities to present his legal arguments before trial may not assert a double jeopardy bar to a second trial caused by belated objections

In *Serfass* v. *United States, supra,* 420 U.S. at 394, the Court reserved decision on "the case put by the

[22] We discuss this point at greater length at pages 37–43, *infra.*

Solicitor General, of 'a defendant who is afforded an opportunity to obtain a determination of a legal defense prior to trial and nevertheless knowingly allows himself to be placed in jeopardy before raising the defense.'" This case presents such a situation. The indictment charged on its face that petitioner engaged in numbers gambling, and so any defect caused by the miscitation of the Massachusetts statute was apparent from the moment the indictment was returned. Fed. R. Crim. P. 12(b)(2) permits, if it does not require, defendants to raise such objections before trial.[23] We believe that petitioner's failure to raise his objection before trial removes any double jeopardy bar to the

[23] Rule 12 permits the raising before trial of any objections to the indictment. It requires the raising before trial of all objections other than contentions that the indictment fails to show jurisdiction or to charge an offense. Objections to the indictment may be made belatedly only for good cause shown, and even then may be decided only if no party's right to appeal will be adversely affected. Fed. R. Crim. P. 12(c) and (e). Petitioner has not contended that there was good cause for his delay, and the potential effect on the United States' right to appeal is apparent.

If a motion should have been filed before trial but was not, the objection is waived. *Davis* v. *United States,* 411 U.S. 233; cf. *Wainwright* v. *Sykes,* No. 75–1578, decided June 23, 1977. Whether there was a formal "waiver" in this case depends upon whether the objection to the indictment would, if correct, have established that it failed to state an offense. We submit that the objection was not of this sort, since the indictment set out all of the elements of the offense and was defective, if at all, only because of the mis-citation of the state statute. See Wright, *Federal Practice and Procedure: Criminal* § 193 (1969) (formal errors must be raised before trial or be deemed waived). But the presence or absence of formal "waiver" is, in our view, unimportant, because the timing of the objection operates in any event to extinguish any double jeopardy objection to a second trial.

holding of any further proceedings that may be required by his tardiness.[24]

When an objection to an indictment is raised before the trial, the district court has ample time (which it lacked here) to study the objection and come to a considered decision.[25] If the court identifies a flaw in the indictment, it may be amended before trial; if the court rejects the defendant's arguments, the trial can proceed with the legal issue settled; and if the court should incorrectly dismiss the indictment, the United States could appeal before trial under 18 U.S.C. 3731. See *Serfass* v. *United States, supra.* All of these possibilities would avoid any need for two trials. The need for a second trial could arise only if the court were to reject a well-founded objection; in that event, however, the jury might acquit, and if it were to convict a second trial could be held without offending the Double Jeopardy Clause. See *Abney* v. *United States,* No. 75–6521, decided June 9, 1977, slip op. 14; *United States* v. *Tateo,* 377 U.S. 463.

[24] The United States raised this argument in the court of appeals (Br. for Appellant 21–23), although that court found it unnecessary to consider it (see Pet. App. 9a–10a and n. 7). We present the argument again here because the United States "as respondent may make any argument presented below that supports the judgment of the lower court." *Hankerson* v. *North Carolina,* No. 75–6568, decided June 17, 1977, slip op. 6 n. 6. This argument supports the judgment of the court of appeals even if this Court should disagree with our previous submission, that a second trial may be held under the principles of *Lee* and *Dinitz.*

[25] Cf. *Lee* v. *United States, supra,* slip op. 11 (remarking that the "last-minute timing" of the motion to dismiss made it reasonable to defer disposition until the court had an adequate opportunity to research the defendant's contentions).

Lee and *Dinitz* hold that the most important value that might be disserved by a mid-trial termination in advance of a resolution of the general issue is the right of the defendant to obtain the verdict of the factfinder. That interest, and the related interest in avoiding a second trial, are so strong that "manifest necessity" is required to abort a trial over a defendant's objection. But different principles apply when a defendant does not want to receive a verdict; if he himself seeks a termination, that request is sufficient to authorize both the termination and a second trial, There is no need for special justification to "deprive" a defendant of a verdict he does not want to receive. When the defendant exercises control over the course of the trial and elects to terminate the proceeding, a second trial may be held.

Defendants may exercise such control not only by asking for a mid-trial termination (as in *Lee* and *Dinitz*) but also by determining the timing of the requests they make. Petitioner exercised both sorts of control here; by waiting until jeopardy had attached before objecting to the sufficiency of the indictment, petitioner influenced the course of proceedings and subjected himself to an unnecessary jeopardy.

There can be no reasonable doubt that petitioner knew about the statutory mis-citation in advance of trial. Pretrial proceedings had consumed three years, and "[m]otions of every kind and description were brought over that period" (A. 43). When the district court asked petitioner's counsel why the objection to the indictment had been made only after six days of

trial, counsel responded that his objections "did not ripen" (A. 44) until the prosecutor asked the court to take judicial notice of the text of the state statute. Counsel continued (*ibid.*): "If the Court had been asked [to take judicial notice] at the beginning of the trial, I planned to raise it then. I expected, actually, that it [would] be asked at the beginning of the trial, but it was not."[26] Counsel's concession that she had "planned" to raise the issue at the beginning of trial implies that counsel was aware before trial of the grounds of the contention and that he deliberately delayed raising those grounds until jeopardy had attached.

We submit that the Double Jeopardy Clause does not bar a second trial when the defendant subjects himself to an unnecessary jeopardy before raising objections to the sufficiency of the charge. See *United States* v. *Kehoe,* 516 F. 2d 78 (C.A. 5), certiorari denied, 424 U.S. 909.[27] Whether the making of a be-

[26] On hearing this explanation the district court remarked (A. 44): "I don't follow that. I don't think that's right at all."

[27] In *Kehoe* the defendants were charged with embezzling land from a federally-insured savings institution. They did not contend before trial that embezzling land is no offense. After the prosecution had presented its evidence, however, defendants argued that real property may not be the subject of embezzlement. The district court agreed and "acquitted" them. Defendants were then charged and convicted of making false entries in the records of a federally-insured institution, and they contended that the Double Jeopardy Clause barred their second trial. The court of appeals disagreed and held (516 F. 2d at 86; footnote omitted) that "a defendant who for reasons of trial tactics delays until mid-trial a challenge to the indictment that could have been made before the trial—and before jeopardy has attached—is not entitled to claim the protection of the double jeopardy clause when his objections to the indictment are sustained" and he is later tried on a proper charge.

lated claim is viewed as a "waiver" of a plea of former jeopardy or, perhaps more accurately, simply as a consent to a belated disposition of the objection, does not matter. The central point is that the Double Jeopardy Clause's special rules of finality should not extend to defendants who withhold arguments until jeopardy attaches. There is no reason why a clever defendant should be allowed to transmute a drafting error (or his ability to persuade the district court that there has been a drafting error) into immunity from prosecution merely by delay in calling the matter to the court's attention. One commentator has expressed the matter well (Note, *Double Jeopardy and Government Appeals in Criminal Cases,* 12 Colum. J. L. & Soc. Probs. 295, 343–344 (1976)):

> When jeopardy attaches only as a result of the defendant's delay, jeopardy could have been completely avoided had the defendant moved to dismiss at the proper time. It [is] thus the defendant who "effectively (and unnecessarily)" placed himself in jeopardy * * *. * * * [T]he subsequent trial is in effect the * * * only one that the defendant would have undergone, but for his own deliberate choice of dilatory tactics. * * *
>
> The gravamen of this approach is the defendant's voluntary assumption of jeopardy in the proceedings leading to dismissal. * * * The double jeopardy clause's ban on retrials is designed as a brake on state power and as a curb on the number of times the state, with all its resources, can present its proofs in an attempt to convict. It is designed to curb prosecutions

> at the Government's behest, not prosecutions which, for tactical reasons, the defendant voluntarily chose to undergo and which the defendant could legitimately and easily have avoided. * * * [W]here the defendant allows himself to be placed in jeopardy in order to cut short the prosecution, the Government [should] have one chance at a complete trial * * *.

No legitimate interest of the accused is served by allowing him to accept an unnecessary attachment of jeopardy only to seek thereafter to prevent an adjudication on the merits of the charge. A defendant who does so will not be put to trial twice at the government's behest. Moreover, the prosecutor has no opportunity in such circumstances to manipulate events or harass the defendant; indeed, any "manipulation" is the defendant's choice, not the prosecutor's. The defendant is not deprived of his opportunity to submit his case to the jury and to receive its verdict; to the contrary, the defendant in such cases begins the trial with the intent to avoid any such submission, and the termination of the trial could not "deprive" him of something he does not seek.[28]

[28] The case is more difficult where a defect apparent on the face of the indictment might be characterized alternatively as a drafting problem or as a reason why the defendant in fact committed no crime. In such cases the defendant arguably should be entitled to await the government's proof and then to argue that the facts proved do not make out any crime. But where, as here, the only problem is one of technical draftsmanship, there is no reason why a defendant has a legitimate interest in allowing jeopardy to attach before drawing the defect to the court's attention. After all, the only reason for requiring technical adequacy in an indictment is to ensure that the defendant is not prejudiced by lack of adequate notice of the charges. A defendant who is aware of the defect is, by that token, in a position to obtain any necessary clarification prior to trial, and it is difficult to understand what (other than the manufacturing of a double jeopardy defense) the defendant could legitimately gain by keeping knowledge of the defect to himself until after jeopardy has attached.

By delaying raising his objection to the indictment, petitioner capitalized on a formal mis-citation that easily could have been cured before trial and that, as the court of appeals later held, was no error at all. Yet petitioner turned that mis-citation into the termination of a six-day trial, and he now contends that because he led the district court into error he may not be reprosecuted. The timing of petitioner's motion profoundly influenced the course of this case, and it generated proceedings and legal disputes that would have been unnecessary if petitioner had raised his contention at the proper time. Petitioner converted a drafting foible into the dismissal of the case against him.

We submit that the Double Jeopardy Clause does not require that this be the end of the matter. Petitioner's delay was a matter of his choice, and he had it within his power to obtain a decision at a time long before any values protected by the Double Jeopardy Clause were implicated. Having made the decision that his interests were best served by raising his contentions well into the trial, petitioner should not be entitled to complain that, because of the timing of his motion, the error he induced the district court to commit cannot now be corrected without holding another trial.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FOR ARGUMENT

In the Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 76-1040.

THOMAS SANABRIA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Reply Brief for the Petitioner.

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REPLY BRIEF FOR THE PETITIONER

I. THE DECISION WHICH THE GOVERNMENT SOUGHT TO APPEAL WAS THE JUDGMENT TERMINATING THE PROSECUTION AGAINST THE PETITIONER. THAT JUDGMENT WAS AN ACQUITTAL IN SUBSTANCE AS WELL AS FORM. THEREFORE, THE FIRST CIRCUIT WAS DEPRIVED OF APPELLATE JURISDICTION BY THE DOUBLE JEOPARDY CLAUSE.

The Government concedes that the Double Jeopardy Clause forbids a second trial

after a defendant has been acquitted. Govt. Br. 9. The Government also concedes that the test of an acquittal is whether it "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." Govt. Br. 25-26 (quoting Lee v. United States, 97 S.Ct. 2141, 2146 n. 8 (1977)). But the Government utterly fails to confront the question of whether the judgment rendered by the district court was an acquittal under this test. Instead, the Government focuses exclusively on whether the district court's mid-trial ruling excluding numbers evidence was an acquittal. Govt. Br. 26. That, however, is not the issue because as petitioner emphasized in his brief (at p. 21), the district court's ruling on the evidence of numbers activity did not constitute a dismissal of the indictment or otherwise terminate the prosecution against him.[1/] Before the district court could

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1/ In seeking to respond to petitioner's argument that the Government's appeal was barred by that portion of 18 U.S.C. §3731 which prohibits Government appeals from

(cont.)

terminate the prosecution against the petitioner it had to take the further step of evaluating the remaining evidence in the case against the petitioner, and resolving "factual elements of the offense charged." It was only after the district court had evaluated this evidence and found it to be factually insufficient, that it directed the entry of final judgment and it was only after the entry of that judgment that the Government sought to appeal. Because

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1/ cont.

evidentiary rulings made after the attachment of jeopardy, the Government emphasizes that it did not seek to appeal during trial. Govt. Br. 17. Nevertheless, the Government persists in regarding the district court's ruling excluding numbers evidence in isolation, as if it had sought to appeal from that ruling during trial. The Government cannot have it both ways. If it is claiming, as it must, that it sought to appeal from the judgment "terminating the prosecution," it must confront the whole judgment and not slice it up to suit its convenience.

that final judgment was an acquittal in substance as well as form, the First Circuit lacked appellate jurisdiction and its decision must be vacated. United States v. Martin Linen Supply Co., 97 S.Ct. 1349, 1354 (1977).

II. THE JUDGMENT OF ACQUITTAL DISCHARGED PETITIONER OF THE CRIME OF ENGAGING IN AN ILLEGAL GAMBLING BUSINESS. FURTHER PROSECUTION ON THE BASIS OF NUMBERS EVIDENCE IS BARRED BECAUSE IT WOULD BE PROSECUTION FOR "THE SAME OFFENSE" OF WHICH PETITIONER WAS ACQUITTED.

A. The Government's Reliance on a Hypothetical Two-Count Indictment Is Misplaced.

The Government concedes that the indictment charges petitioner with a single federal crime, engaging in an illegal gambling business, and that numbers betting and horse betting were "simply two components of the same offense." Govt. Br. 11, 31-32. Nevertheless, the Government seeks to avoid the inevitable consequence of this concession -- that a second trial of petitioner is constitu-

tionally barred -- by arguing that

> "each theory of criminal liability would have been the basis of a separate count of the indictment. If petitioner had been charged in two courts with (1) conducting a horse betting gambling ring, and (2) conducting a numbers betting gambling ring, the proper resolution of this case would be apparent. The district court would have entered two separate judgments, one acquitting petitioner of the horse betting offense and the other dismissing the numbers indictment because it was defective on its face." Govt. Br. 10-11.

1. The Defendant's Rights Must Be Determined on the Basis of What Happened, Not What Might Have Happened.

The short answer to this argument, like the short answer to similar speculation by the court of appeals (see Pet. Br. 38-40), is that how the indictment could have been drafted and what the district court would have done, have nothing to do with this case. The Government seems to forget that that precise wording of an indictment is extremely important in guaranteeing to a

defendant (a) that he will not be prosecuted for a federal felony except on the finding of a grand jury -- Stirone v. United States, 361 U.S. 212 (1960); (b) that he will not be convicted for a crime of which he has not been charged -- Cole v. Arkansas, 333 U.S. 196 (1948); (c) that he will receive adequate notice of the charges against him to prepare his defense -- Russell v. United States, 369 U.S. 749, 763-764 (1962); and (d) that the offense will be described with sufficient precision to enable him to assert the defense of double jeopardy in the event he is later prosecuted for a similar offense -- Russell v. United States, supra.

The Government also seems to forget the adversary nature of an indictment. Such matters as whether a defendant is charged under a one-count, two-count, or ten-count indictment are important strategical decisions over which the Government has complete control -- subject only to the right of a grand jury to approve or disapprove the final product. A criminal defendant has no input into the drafting of the

accusatory instrument against him, and there is no reason why the Government should not be compelled to accept the consequences of its own draftsmanship. Indeed, especially considering that a criminal defendant is bound by his own strategical decisions, the adversary system requires nothing less.

2. Even in the Government's Hypothetical, the Double Jeopardy Clause Would Still Foreclose Further Prosecution.

The second answer to the Government's argument is that even if it had prosecuted petitioner in a two-count indictment, it would still face the same problems it faces here. The only state statute cited in the actual one-count indictment was Mass. G.L. c. 217 §17. Thus, for the Government's hypothetical to be at all faithful to the present case, this would also be the only state statute cited in each count of the hypothetical two-count indictment. The first count would cite Mass. G.L. c. 217 §17 and refer in words to betting "on the

result of a trial and contest of skill, speed, and endurance of beast," while the second count would cite the same state statute and refer in words to betting "on a parimutuel numbers pool." The petitioner would go to trial on both counts, and would move at the close of the Government's case to exclude the evidence of numbers betting as to both counts on the ground that both counts were in fact horse betting counts because of the citation of Mass. G.L. c. 217 §17. The district court would then exclude the numbers evidence, as it did here, and enter a judgment of acquittal on both counts.

In sum, imagining that the indictment had been brought in two counts does not solve the Government's irreducible problem: the fact that petitioner was acquitted of the offense for which the Government now seeks to prosecute him.

B. The Petitioner Did Not Waive His Double Jeopardy Claims.

1. Petitioner did not have a "legal defense" to the indictment and, therefore, cannot be deemed to

have "submitted himself to an unnecessary jeopardy."

The Government concedes that the indictment against petitioner was legally sufficient and not vulnerable to a pretrial motion to dismiss for failure to state an offense. Govt. Br. 37 n. 23. Consequently, the Government also concedes that petitioner's "objection" to the indictment was not formally waived by his failure to assert it prior to trial. Id. Further, the Government concedes, and in so conceding tacitly confesses error in the decision of the court of appeals, that the indictment was not duplicitous. Govt. Br. 15 n. 8. Nevertheless, despite these concessions, the Government chastizes petitioner for failing to raise his "objection to the indictment" prior to trial and for "subject[ing] himself to an unnecessary jeopardy." Govt. Br. 12-13, 36-43.

The contradiction in the Government's position is apparent. On the one hand, the Government acknowledges that the indictment was legally sufficient, that it could not have been dismissed for failure to state an

offense, and that it irresistably placed the petitioner in jeopardy on the charge of engaging in an illegal gambling business. On the other hand, the Government attacks petitioner for failing to assert his "objection" to the indictment prior to trial and for submitting himself to an "unnecessary" jeopardy. Significantly, the Government nowhere in its brief describes the type of motion petitioner could have brought prior to trial to assert his "objection." Petitioner submits that this failure is no accident. The Government cannot describe the type of pretrial motion the petitioner could have made to assert his "objection to the indictment" because the petitioner's so-called "objection to the indictment" was not an "objection to the indictment" at all. It was rather a motion to strike numbers evidence on the ground that this evidence was irrelevant given the way that the indictment had been drafted. Such a motion to strike is properly made during trial.

2. The Government's position on waiver would impose on the criminal defendant an unconstitutional burden to help the Government improve its case against him.

Indeed, the Government's position represents an attempt to place on the criminal defendant an unprecedented burden. The Government concedes that the indictment validly charged the crime the Government intended to charge. The only thing the indictment did not do was to charge the crime in precisely the manner in which the Government would, in retrospect, have wanted to charge it. Thus, in asserting that the defendant should have pointed this out to the Government, the Government is asserting nothing less than that a criminal defendant is obligated to assist the Government in improving the case against him. Such a proposition flies in the face of our adversary system of criminal justice (cf. Mullaney v. Wilbur, 421 U.S. 684 (1975); In re Winship, 397 U.S. 358 (1970)), and encroaches upon the defendant's privilege against self-incrimination (cf. Leary v. United

States, 395 U.S. 6 (1969); Marchetti v. United States, 390 U.S. 39 (1968)). This becomes particularly apparent when one considers that in order to determine whether an indictment charges him of a crime in the manner the Government intended, a criminal defendant may well have to rely on his own knowledge of the evidence against him. Here petitioner was tried with ten codefendants, all of whom were convicted exclusively on the basis of horse betting evidence. Presumably if the horse betting evidence against petitioner had been overwhelming, and the evidence of numbers betting non-existent, he would have had no obligation to assert a pretrial "objection to the indictment." Thus, the inevitable result of the Government's position is not only that a criminal defendant must help the Government improve its case, but that he must do so on the basis of his own knowledge of the evidence against him. This would plainly be a violation of the privilege against self-incrimination.

3. Jeffers v. United States is plainly distinguishable.

In Jeffers v. United States, 97 S.Ct. 2207 (1977), the defendant was named in two indictments, one charging him with conspiracy to violate the narcotics laws in violation of 21 U.S.C. §846, the other charging him with conducting a continuing criminal enterprise in violation of 21 U.S.C. §848. Eight members of the Court held that the conspiracy was a lesser included offense of the continuing criminal enterprise. Consequently, the Court ruled that the crimes should have been prosecuted simultaneously and that the double jeopardy clause would ordinarily bar successive trials. This Court divided, however, on whether the successive trials against Jeffers constituted a violation of his constitutional rights in light of the fact that Jeffers had specifically and successfully opposed the Government's motion to have a joint trial of the two indictments. Four members of the Court found that Jeffers' opposition to the motion for joint trial constituted a waiver of his double jeopardy claim against suc-

cessive prosecutions. And four members of the Court found that it did not constitute such a waiver.

Petitioner maintains that there was no waiver in Jeffers but that, in any case, the Court does not need to confront that issue here because the present case is plainly distinguishable. In Jeffers, the Justices opposing a finding of waiver observed:

> "Most trial lawyers will be startled to learn that a rather routine joint opposition to that motion to consolidate has resulted in the loss of what this Court used to regard as 'a vital safeguard in our society, one that was dearly won, one that should continue to be highly valued'...." 97 S.Ct. at 2220.

This observation applies here a fortiori. It is one thing to say that a defendant waives his constitutional right against successive trials when he specifically and successfully opposes a consolidated trial. It is quite another to say, as the Government does here, that a defendant waives that right merely by moving to strike evidence. Indeed, the acceptance of such a

proposition, especially when coupled with the Government's claim that it has the right to appeal from the dismissal of any "discrete basis of criminal liability," would result in the virtual elimination of the constitutional protection against successive prosecutions. This is because, as pointed out at page 13 of petitioner's principal brief, practically every decision excluding evidence can be characterized as a dismissal of a discrete basis of criminal liability. Therefore, if as the Government contends, a motion to exclude evidence constituting "a discrete basis of criminal liability" is a waiver of the right against successive prosecution on that basis of liability, the constitutional guarantee of the finality of acquittals and the constitutional protection against successive prosecutions are all but destroyed.

Conclusion

The judgment of the court of appeals should be vacated and the case remanded to that court with a direction that the Govern-

ment's appeal be dismissed for lack of appellate jurisdiction, and with a further direction that petitioner not be retried for violating 18 U.S.C. §1955 on the basis of numbers evidence, or, for that matter, on any other basis.

Respectfully submitted,

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